TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 449

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE RUBEROID CO.

No. 504

THE RUBEROID CO., PETITIONER

vs.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1951
(CASE NO. 449)

PETITION FOR CERTIORARI FILED DECEMBER 28, 1951
(CASE NO. 504)

CERTIORARI GRANTED JANUARY 26, 1953

SUPREME COURT OF THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In the United States Court of Appeals for the Second Circuit

THE RUBEROID CO., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Appendix to petitioner's brief

Statement pursuant to rule 15 (b)

Complaint issued by Federal Trade Commission July 26, 1943.
There has been no change in parties.
Answer of the respondent, The Ruberoid Co., filed September 24, 1943.
Hearings held before Charles B. Bayly, Trial Examiner, commencing March 7, 1946, and ending April 26, 1948.
Order to cease and desist issued January 20, 1950.
Petition for review filed April 25, 1950.

2 BEFORE FEDERAL TRADE COMMISSION

Docket No. 5017

IN THE MATTER OF THE RUBEROID COMPANY, A CORPORATION

Complaint

Filed July 26, 1943

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has been since June 19, 1936, and is now violating the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charged with respect thereto as follows:

Paragraph One. Respondent, The Ruberoid Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York. Respondent corporation is now and has been since June 19, 1936, engaged in the business of processing, manufacturing, offering for

sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products in all parts of the United States.

The respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating materials and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Maryland;
3 Mobile, Alabama; Erie, Pennsylvania; Millis, Massachusetts and Chicago, Illinois. The respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicators" herein used applies to corporations, individuals, partnerships and firms known as building or roofing contractors who apply the products purchased from the respondent to buildings. The "applicators" usually sell the respondent's products to consumers on a contract basis, charging the consumer for the materials used and the labor employed in connection with the applying of the asbestos and asphalt roofing and insulating materials to buildings.

Paragraph Two. Respondent sells and distributes its products in commerce between and among the various states of the United States and in the District of Columbia and preliminary to or as a result of such sales, causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various states of the United States and in the District of Columbia other than the state of origin of the shipment and there is and has been at all times herein mentioned a continuous current of trade and commerce in said products across state lines between respondent's plants, factories or warehouses and the purchasers of such products. Said products are then sold and distributed for use and resale within the various states of the United States and within the District of Columbia.

Paragraph Three. In the course and conduct of its business, as aforesaid, respondent has been and is now in substantial competition in commerce with other manufacturers and sellers of asbestos and asphalt roofing and insulating materials and allied products and who for many years prior thereto have been
4 and are now engaged in manufacturing, selling and shipping such products in commerce across state lines to purchasers thereof located in the various states of the United States.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers, respectively, offer for sale and sell the said products purchased from respondent.

Paragraph Four. In the course and conduct of its said business, since June 19, 1936, respondent has been and is now discriminating in price between different purchasers buying said products, by selling them to some of its customers at higher prices than it sells products of like grade and quality to other customers who are competitively engaged in the resale of said products within the United States with customers receiving the lower prices.

The respondent grants and allows to all of its customers a cash discount of 2% if the invoice is paid within a specified time.

Paragraph Five. The respondent has discriminated in price by the use of a so-called trade discount schedule whereby it has sold to some customers at higher prices than it has sold goods of like grade and quality to other customers who are in competition with them in the resale of said products within the United States. The so-called trade discount schedule includes two types of discounts, one known as a "distributor commission" and the other known as a "wholesaler discount." The trade discount schedule used by the respondent is more particularly described as follows:

(a) The respondent grants to some of its customers who are engaged in the resale of asphalt roofing products of like grade and quality in competition with other of respondent's customers, a "distributor commission" ranging from 5% to 10% to be deducted from the invoice price and a "wholesaler discount" of 5% off the invoice price.

The "wholesaler discount" of 5% allowed by the respondent to its favored customer is in addition to the "distributor commission" ranging from 5% to 10% granted and allowed to the same customers.

(b) The respondent grants to some of its customers who are engaged in the resale of asbestos shingles and siding of like grade and quality in competition with other of respondent's customers, a "distributor commission" of 5%, and in some instances 6%, to be deducted from the invoice price and a "wholesaler discount" of 6% off of the invoice price. The "wholesaler discount" of 6% allowed by the respondent to its favored customers is in addition to the "distributor commission" of 5%, and in some instances 6% granted and allowed to the same customers.

The "distributor commission" and "wholesaler discount" herein referred to are allowed to some and withheld from other customers of the respondent who purchase from the respondent asphalt roofing products and asbestos shingles and siding and allied products and who are in competition with each other.

Paragraph Six. The effect of the discrimination in price generally alleged in Paragraph Four hereof and of the
6 discriminations specifically set forth in Paragraph Five hereof has been, or may be, substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those from whom they are withheld. The effect also has been or may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in the said line of commerce in the various localities or trade areas in the United States where said favored customers and their disfavored competitors are engaged in business.

Such discriminations in price by respondent between different purchasers of commodities of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of Subsection 2 (a) of Section 1 of said Act of Congress approved June 19, 1936, entitled "An Act to Amend Section 2 of an Act Entitled, 'An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes' Approved October 15, 1914, as amended, U. S. C. Title 15, Section 13 and for Other Purposes."

Wherefore, the premises considered, the Federal Trade Commission on this 26th day of July A. D. 1943, issues its complaint against said respondent.

* * * * * * *

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secre-
7 tary and its official seal to be hereto affixed, at Washington, D. C., this 26th day of July A. D. 1943.

By the Commission.

[SEAL] Otis B. Johnson,
OTIS B. JOHNSON,
Secretary.

BEFORE FEDERAL TRADE COMMISSION

Answer of the Ruberoid Co.

Filed September 24, 1943

Now comes the respondent The Ruberoid Co., erroneously called "The Ruberoid Company" in the above-entitled complaint, and denies that it is now violating, or has ever violated, the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved

June 19, 1936, and for answer to the complaint in the above entitled proceeding the respondent says:

Paragraph One. The respondent admits that it is a corporation organized and existing under the laws of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York; that it is now and has been since June 19, 1936, engaged in the business of processing, manufacturing, offering for sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products in many parts of the United States; that it is one of the largest manufacturers and distributors in the United States of asbestos and asphalt roofing, insulating materials and allied products; that it maintains and operates branch warehouses and sales offices in Baltimore, Maryland; Mobile, Alabama; Erie, Pennsylvania; Millis, Massachusetts, and Chicago, Illinois; that it sells its products directly
8 to some wholesalers, to some retailers and to some "applicators"; that the term "applicator" herein used applies to corporations, individuals, partnerships and firms known as building or roofing contractors who apply the products purchased from the respondent to buildings; and that the "applicators" usually sell the respondent's products to consumers on a contract basis, charging the consumer for the materials used and the labor employed in connection with the applying of the asbestos and asphalt roofing and insulating materials to buildings. They deny all allegations of Paragraph One of the complaint not expressly admitted herein.

Paragraph Two. The respondent admits that in some instances it sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia, and that preliminary to, or as a result of said sales in some instances it causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various States of the United States, and in the District of Columbia other than the State of origin of the shipment. The respondent admits that there is and has been in some instances a current of trade and commerce in respondent's products across State lines between respondent's plant, factories or warehouses and the purchasers of such products. The respondent admits that its products are sold and distributed for use and resale within various States of the United States and within the District of Columbia. The respondent states that in many instances commerce between and among the various States of the United States or in the District of Columbia is not involved in the sale and distribution of the respondent's products. The respondent denies all allegations of Paragraph

Two of the complaint not expressly admitted herein.

9 Paragraph Three. The respondent admits that, in the course and conduct of its business, it has been and is now in substantial competition in commerce with other manufacturers and sellers of asbestos and asphalt roofing and insulating materials and allied products, who for many years prior hereto have been and are now engaged in the manufacturing, selling, and shipping of such products in commerce across State lines to purchasers thereof located in various States of the United States. The respondent admits that many of its customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers respectively offer for sale and sell the said products purchased from respondent. The respondent states that many of its customers are not competitively engaged with other customers of the respondent or with customers of respondent's competitors, and that many of said respondent's customers at times are engaged in such competition and at times are not so engaged. Respondent denies all allegations of Paragraph Three of the complaint not expressly admitted herein.

Paragraph Four. The respondent admits that it usually allows its customers a cash discount of 2% if the invoice is paid within a specified time. The respondent denies that it is now discriminating or has ever discriminated in price between purchasers of its products. The respondent denies all allegations of Paragraph Four of the complaint not expressly admitted herein.

Paragraph Five. The respondent states that it has been its general practice to grant to wholesalers who purchase its asphalt and asbestos roofing products a wholesalers' discount of 5%

10 above the discount granted to retailers and applicators, but that this discount has varied from time to time and from place to place, depending upon competitive conditions in the industry. Respondent denies that it has ever discriminated in price as between purchasers of its products. The respondent states that any differentials in the prices of its products made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof, or were made in good faith to meet equally low prices of competitors. The respondent denies that the effect of any act committed by it and complained of herein may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. The respondent denies all allegations of Paragraph Five of the complaint not expressly admitted.

Paragraph Six. The respondent denies all the allegations of Paragraph Six of the complaint.

Wherefore, having fully answered, the respondent prays that the complaint be dismissed.

THE RUBEROID CO.,
By ——— ———,
President,
Address: 500 Fifth Avenue, New York 18, N. Y.

SPENCER GORDON,
WILLIAM M. AIKEN,
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
Union Trust Building, Washington 5, D. C.
Attorneys for Respondent.

11 BEFORE FEDERAL TRADE COMMISSION

Transcript of testimony.

COURT ROOM 245, UNITED STATES POST OFFICE,
600 Camp Street, *New Orleans, Louisiana,*
March 7, 1946.

Met, pursuant to notice, at 10:00 a. m.

Before CHARLES B. BAYLY, Trial Examiner.

Appearances: James I. Rooney Attorney for the Federal Trade Commission. William M. Aiken, Attorney for the respondent The Ruberoid Co. (Covington, Burling, Rublee, Acheson & Shorb, 701 Union Trust Building, Washington, D. C.)

* * * * *

ERNEST J. O'LEARY was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. For the record, please state your full name, Mr. O'Leary.—A. Ernest (Spelling) E-r-n-e-s-t J. O'Leary (Spelling) O-'-L-e-a-r-y.

Q. And you reside where, Mr. O'Leary?—A. 1509 Kingsway (Spelling) K-i-n-g-s-w-a-y Road, Baltimore 18, Maryland.

12 Mr. ROONEY. At this point, Mr. Examiner, I'd like the record to show that Mr. O'Leary has appeared here at New Orleans through the consent of counsel for the respondent, and the Commission will not be responsible for his travel from Baltimore to New Orleans—to the local area of New Orleans itself.

Trial Examiner BAYLY. That's agreeable to you, Mr. Aiken?

Mr. AIKEN. That is agreeable.

Trial Examiner BAYLEY. Very well.

By Mr. ROONEY:

Q. What is your position with The Ruberoid Company, Mr. O'Leary?—A. I am Sales Manager of the Southern Division of the Ruberoid Company.

Q. And the Southern Division includes what area?—A. The Southern Division embraces the following territory: Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, and parts of Tennessee.

Q. How long have you been in that position, Mr. O'Leary?—A. Since approximately November 6, 1945, by designation; but from the standpoint of activity, since approximately January first of 1946.

Q. Prior to that time, what was your position?—A. Prior to that time I was Manager of the Mobile District.

Q. Would you tell us what the Mobile District included?—A. The Mobile District comprised the following territory:

Florida, approximately one-half of Georgia, Alabama,
13 Mississippi, Louisiana, Texas, the greater part of Arkansas, and parts of Tennessee.

Q. Would you tell us, in a general way, what products the Ruberoid Company manufactures in the Mobile area?—A. At the Mobile plant, which serves the so-called Mobile District area, we produce asphalt roofing and siding products, build-up roofing materials of asphalt nature, asbestos cement roofings and sidings, asbestos cement wallboard, roof coatings, and plastic cement of asphalt base. That, in general, is what we produce.

Q. When you say that, roofing products, that includes shingles?—A. That includes shingles and roll roofings.

Q. Now, at the request of counsel, on March first, you were requested to bring certain documents to the hearing this morning?—A. Yes.

Q. And you have brought, pursuant to that, the copies of all your price lists published by The Ruberoid Company—published from June 19, 1936, to date?—A. Yes; to the best of my knowledge that file contains that information.

Q. We will pass those for the time being and take them up at a later time. Now, you were requested to bring the published discounts, if any, which The Ruberoid Company allowed its customers from June 19, 1936, to date?—A. Those published discounts, in the main, are included in the price file—the information file that I have brought.

Q. I see. These are included in the price file?—A. Such published discounts as were available, or were published in the trade.

14 Q. Now, you were also requested to bring any published classification of The Ruberoid Company's customers, from June 19, 1936, to date?—A. Such published classification as were available, or issued, have been brought, to the best of my knowledge.

Q. They are included—— A. They are included in that file.

Q. In that file of prices?—A. Yes, sir.

Q. Now, were there any discounts allowed to customers that were not published?—A. Yes; at times discounts were allowed to certain classes of customers that were not published.

Q. Would you tell us what classification of customers the Respondent had? How did they classify their customers?—A. In general, that classification was grouped into two parts: Part One was the wholesaler, or jobber, or wholesale-distributor. Those designations generally classify a particular group.

Two: Retail merchants. In that category falls lumber and building material dealers, hardware dealers, roofing contractors, or applicators.

Q. Those were the two classifications?—A. The two basic classifications.

Q. Now, do you have any other classifications? You mention "basic."—A. At times, in the past, to the best of my memory, we have sold to the Federal Government, as a specific classification. Also, to industrial buyers, as a specific classification.

Q. Would you elaborate what you classify in those two items?—A. I refer to a manufacturing concern in most cases; the

19 type that would, perhaps, function in an interstate manner. Take a concern like—well, American Can Company would be a national industrial, or an industrial buyer. We'll say General Motors would be an industrial buyer, or any of the steel mills, or things of that character.

Let me say, at this point, that our activity with respect to sales to these classes of buyers has changed during the period covered by the price information that you have requested.

Q. Would you tell us, if you can, what changes there were?—A. It is quite possible—and I say this from memory, because of the period of time involved, the length of time involved—it is quite possible that we might have discontinued sales, direct sales, to an industrial buyer. That, in the main, would be the published change that might have taken place.

Q. Now, how about any unpublished change that might have taken place?—A. That would be brought about, in the main, by competitive conditions.

Q. Now, this latter classification, or this latter change that you mentioned: due to competitive conditions. Did that result in a change of your basic classifications?—A. No; it did not.

Q. Could you tell us, Mr. O'Leary, from your knowledge, without going into the published price lists at the time being—could you tell us, generally, the discounts allowed to your customers classified under Group One, which you describe as wholesalers or jobbers or wholesale distributors?—A. Mr. Rooney, those discounts have varied and changed considerably over the period of time involved. I can submit our prevailing discount

picture——

16 Q. Well, what is your prevail——A. If that will help the situation, and I was thinking, generally, that that's what's happened.

First, I must point out that different merchandising plans, or distributing policies have prevailed on asphalt products as compared with asbestos cement products.

Mr. ROONEY. Mr. Reporter, would you repeat that?

(The reporter read the answer as follows:

"First, I must point out that different merchandising plans, or distributing policies have prevailed on asphalt products as compared with asbestos cement products.")

Q. You may go ahead.—A. The historical background covering the sale of these products has brought about a situation of that kind, for the most part.

Q. And what brought that about?—A. Well, I said, Mr. Rooney, the background: they are two different products. As roofing material, in the past, the relation with respect to their use has not been especially similar. In general, most applicators of asphalt products did not apply asbestos cement products. When I say that, of course, I refer to a general scope; not specifically to an area.

Q. Could you elaborate on that a little bit?—A. I will go to this extent: Asbestos cement roofing shingles have been, in the past, recognized as a hard roofing material, similar to slate. It has always been the practice of—in application, for slate to be put on by so-called roofers who specialized in that type of work.

Asbestos cement shingles, roofing shingles, were applied,

17 chiefly throughout the country, to my knowledge, by that class of person. The average carpenter who can—does—and has applied asphalt roofing shingles, invariably kept from

applying asbestos cement roofing shingles because of the greater difficulty of application.

Q. And for that reason you make a distinction between the two?—A. That distinction existed prior to 1936.

Q. I believe this all started out by my asking you what the present discounts were. Now, will you go ahead and give us——A. Will you repeat your question, please?

Q. Give us the present discounts which you give to the various classifications?

Trial Examiner BAYLY. Is that the discounts allowed but not published that you were talking about?

Mr. ROONEY. Published or unpublished.

A. Our published discounts on asphalt roofing products are as follows: Carload—you might put in brackets "rail." (Rail) Carload, or 10-ton truck shipments: carload list price, less 5 percent.

Less than carload, or less than 10-ton truck shipments, list price less 6 and 5 percent.

Mr. AIKEN. Off the record for a moment?

Trial Examiner BAYLY. Off the record.

(Discussion off the record.)

Trial Examiner BAYLY. Hearing resumed.

18 By Mr. ROONEY:

Q. In other words, any customer who buys carload or 10-ton truck shipments gets the 10-ton-carload list, less 5 percent?—A. The O. P. A. price regulations require that we may not sell any customer at any higher price than those published discounts on that quantity material.

Q. Let me frame my question this way, Mr. O'Leary: Regardless of classification, whether you classify them as a wholesaler or jobber, or a wholesaler-distributor, or a retail merchant, if they buy quantities of carload or 10-ton truck shipments, they get the carload list price less 5 percent?—A. Yes; under present conditions.

Q. And if they buy less than carload or less than 10-ton truck shipments they get the LCL list price less 6 percent and 5 percent?—A. They receive not less favorable than that.

Q. I am not asking you whether it's less favorable or not; I am trying to get a statement. Any customer, now, whether he be a wholesaler or a jobber or a wholesale-distributor, if he buys less than carload, or 10-ton truck shipment, he gets the LCL price, list, less 6 percent and 5 percent. Is that right?—A. No; that is not true.

Mr. AIKEN. Well, may I interrupt?

Trial Examiner BAYLY. No. Go right ahead. You keep a notation and take up the witness.

Mr. AIKEN. May I go off the record a second, Your Honor?

Trial Examiner BAYLY. Yes. Off the record.

(Discussion off the record.)

19 Trial Examiner BAYLY, Hearing resumed.

During this time, counsel have had an informal discussion with a view to clarifying the line of questions to be put to the witness.

Mr. ROONEY. What was that last question?

(The reporter read the question as follows:

"Q. I am not asking you whether it's less favorable or not; I am trying to get a statement. Any customer, now, whether he be a wholesaler or a jobber or a wholesale-distributor, if he buys less than carload, or 10-ton truck shipment, he gets the LCL price, list, less 6 percent and 5 percent. Is that right?")

A. Because we extend a more favorable discount to the wholesaler than we do to the retail merchant.

By Mr. ROONEY:

Q. So that when you say that your discount on less—LCL, or less than 10-ton truck shipments, it's the LCL price, list, less 6 percent and 5 percent, that is not entirely true?—A. It is generally true; perhaps, not entirely true, with the exceptions that I stated in the foregoing comments, and with the exceptions as I explained in previous testimony, that might be brought about by competitive conditions.

Q. Well, in other words, if you have classified one of your customers as a wholesaler, and he buys LCL, or less than 10-

20 ton truck shipments, he isn't billed at the LCL list price less 6 percent and 5 percent?—A. Those occasions have happened; yes. The answer to your question is yes.

Q. So that rather than your discounts being based on quantity, it is based on classification?—A. I would say yes.

Q. And regardless of what quantity any customer whom you classified as a wholesaler purchased, he would get the CL list price, less 5 percent?—A. That is not always true, Mr. Rooney, because of competitive conditions that exist in different localities that bring about the matching of that competition.

Q. Well, then he might even get a better price than that, regardless of the quantity?—A. Possible, but not probably.

Q. The reason I asked you that is because you just said that there are other factors that might enter into it, such as competitive conditions, so I say, if the other factors—you mean he would get an additional discount?—A. In general, that certainly would

not apply to LCL shipments, Mr. Rooney, because of the—well, the expense of transportation would enter into that, for instance, on an LCL shipment.

Q. You understand, Mr. O'Leary, I am not trying to say what he gets or what he doesn't get. I am trying to find out.—A. I am trying to tell you, but it is rather complex.

Q. Now, would a customer whom you do not classify as a wholesaler or an industrial customer, I believe you called them—now, if that customer bought carload or a 10-ton truck shipment, would he get the CL price, list less 5 percent, or would he get the LCL price, list less 6 percent and 5 percent?

21 Mr. AIKEN. May I have that again, please? Will you read it to me, please?

(The reporter read the question as follows:

"Q. Now, would a customer whom you do not classify as a wholesaler or an industrial customer, I believe you called them—now, if that customer bought carload or 10-ton truck shipment, would he get the CL price, list less 5 percent, or would he get the LCL price, list less 6 percent and 5 percent?")

A. He would receive the carload price, list less 5 percent.

By Mr. ROONEY:

Q. He would, regardless of the classification?—A. Regardless of the classification.

Q. Now, that is what I am trying to find out, Mr. O'Leary. What is the basis for your discounts?

Mr. AIKEN. Well, may I go——

A. Well, that question is very complex to me.

Trial Examiner BAYLY. Did you want to make an objection to the question?

Mr. AIKEN. May I go off the record again? No, I didn't want to——

Trial Examiner BAYLY. Did you have an objection?

Mr. AIKEN. No. May I go off the record just a second?

Trial Examiner BAYLY. Off the record.

(Discussion off the record.)

22 Trial Examiner BAYLY. Hearing resumed.

Now, Mr. O'Leary, if you can answer that question as accurately as you can.

The WITNESS. Well, Mr. Examiner, I don't understand the question exactly, because I don't know whether or not Mr. Rooney is asking me how we arrived at that carload list price and how we arrived at that 5 percent published discount.

Mr. ROONEY. I wouldn't know.

The WITNESS. Nor would I.

By Mr. ROONEY:

Q. You don't know?—A. I wouldn't know.

Q. Why is this question of discounts complex?—A. Because, as I have just said, if you are asking me how we arrived at a particular carload price, published carload price, and how we arrived at a particular 5 percent published discount, I couldn't give you a logical answer to that, Mr. Rooney.

Q. Well, is it a fact, Mr. O'Leary, that you have a lot of discounts that you give that are not published?—A. No; it is not.

Q. The reason I ask that is because Mr. Aiken seemed to mention that I had in mind published discounts and you had in mind unpublished discounts.—A. No; as I explained in the foregoing testimony, Mr. Rooney, we sell two classes of trade, in general: we sell wholesalers, who are in one group, and retail merchants who are in the other group.

Q. Now, that is clear. We've got that! You have two general classifications of customers. Are those the basis of discounts?—A. Yes.

23 Q. There is no mistake about that?

Mr. AIKEN. Off the record?

Trial Examiner BARLY. Just a minute. We are on the record here.

By Mr. ROONEY:

Q. Now, there is no mistake about that, is there?—A. I don't see that there is.

Q. All right, now. So that the discounts of any customer, that he receives from you, depend on whether he is in the wholesale classification or in the retail classification?—A. I would say that was largely so.

Q. So, if John Jones is classified by you as a wholesale customer, if he buys 10 squares of shingles, he gets the wholesaler's price?—A. Yes.

Q. And if Frank Brown is a retailer; under your classification, and he buys a hundred squares of shingles, he gets it at the retail classification?—A. At the merchant, or dealer's price; yes.

Q. Now, there was nothing odd about that, was there?—A. No. No. I just didn't understand your question before, Mr. Rooney. Rest assured, I am trying to give you the information you are seeking.

Q. Yes. Now, the discounts which you have just given us: that is, the CL less 5 percent, and the LCL, less 6 percent and 5 percent, are the present discounts. Is that correct?—A. Yes, sir.

Q. Now, do you know what they were prior to that change?—A.

Well, from the period of these price lists to the present date they varied so considerably that I wouldn't attempt to tell you, from memory.

24 Q. But they have varied considerably?—A. They have varied; yes, sir.

Q. I believe you did say that your customer would get——

Mr. ROONEY. Strike that.

Q. I believe you did say that were other discounts than the published discounts?—A. I did.

Q. Now, when, where, and how are they granted?—A. We grant, under the present sales policy for these asphalt roofing products, to the wholesale distributor of Ruberoid products, an additional 5-percent discount.

Q. So that while your published discounts for a wholesaler are CL price list, less 5 percent, they are, in actuality, now CL price list less 5 percent and 5?—A. That is not quite true, Mr. Rooney. Our published discounts are not specifically to the wholesaler. I don't believe that I stated that.

Q. They are not specifically to the wholesaler?—A. Not specifically to the wholesaler.

Q. To whom are they? To whom do they apply?—A. They are designed chiefly for the so-called retail dealer or merchant, but our sales under those published discounts must necessarily be influenced by OPA regulations.

Q. Why don't you publish the additional 5 percent to wholesalers? Or, let me put it this way: Why do you publish some and not the others?

Mr. AIKEN. I object to that. It is immaterial.

Trial Examiner BAYLY. Oh, I think that is competent. He may answer it.

Do you understand the question?

25 The WITNESS. Yes; I understand the question, Mr. Examiner.

A. I don't know.

Mr. ROONEY. I wonder if we could take a five-minute recess?

Trial Examiner BAYLY. Yes.

(A short recess was taken.)

Trial Examiner BAYLY. The hearing is resumed.

By Mr. ROONEY:

Q. Mr. O'Leary, how do you classify a customer as a wholesaler?—A. A wholesaler is a concern who is generally recognized in its community as such, who usually buys his stocks—our Ruberoid asphalt products—exclusively—chiefly sells them to the retail dealer or merchant class of trade, who generally have a sales

organization who develop and promote the use of our products.

Trial Examiner BAYLY. Warehouses the material, would you say?

The WITNESS. Maintains an establishment for properly warehousing the materials for servicing their customers.

By Mr. ROONEY:

Q. Who do you classify, in New Orleans, as a wholesaler?—A. In the New Orleans area, in New Orleans as wholesalers of our asphalt products, we presently classify Crescent Materials Service, and Brandin Slate Company. I would say that is all we classify as wholesalers.

26 Q. Now, how do you classify a customer as a retail merchant?—A. A retail merchant or dealer is an individual or concern who maintains and operates an establishment, usually office and warehouse, in which he stocks our material—stocks Ruberoid material—usually on an exclusive basis, for servicing the demands of consumer buyers.

Q. In other words, he is an applicator?—A. He may well be an applicator.

Q. Now, who, in the New Orleans area, do you have classified as of that group?—A. You are referring to today, Mr. Rooney?

Q. Yes.—A. To today! National Roofing Company. Hibernia Roofing and Metal Works. F. J. Villars.

Mr. Examiner, I'd like to find out the number I have listed.

Trial Examiner BAYLY. Would the reporter read back to Mr. O'Leary what he said there?

(The reporter read the answer as follows: "National Roofing Company. Hibernia Roofing and Metal Works, F. J. Villars.")

A. They are the ones that I can remember at the present moment that we sell to on a dealer basis, directly. That's the way I understand the way your question was.

Q. Now, I notice that you have confined these answers to the present time.—A. Yes, sir.

Q. Was there a time when you had others that were included in either one of these classifications?—A. Yes, sir.

27 Q. When you say "the present time," that includes how far back, or how long a time back? How long has this present group been in that class?—A. I would say immediately before the war we sold a greater number of that type of customer.

Q. Was there a time when you had any other customers than Crescent Materials Service and Brandin Slate Company as wholesalers?—A. None that we looked upon as our Ruberoid wholesalers, such as I have described the wholesale Ruberoid wholesaler.

Q. Now, was there a time when you had any other customers

than National Roofing, or Hibernia Roofing, or Villars in the group of retail merchants?—A. Specifically, I can't say that there have, although we have sold, in the past, prior to the war particularly, from my memory, other people in that class of business.

Q. Could you name some of them?—A. A. H. White Roofing Company. This is the dealer classification, now, I will take first: A. H. White Roofing Company. David Usner Sheet Metal Works; Albert Brandin Slate and Roofing Company.

Q. What was that last one?—A. Albert Brandin Slate and Roofing Company. Joseph Modenbach. Jordy Brothers. During that period which was prior to the war, we sold materials directly to J. Wilton Jones.

Q. That is, in this classification?—A. No, sir.

Q. In the wholesaler?—A. Yes, sir; in the wholesaler class. Generally, the wholesaler classification—not our Ruberoid wholesale classification, but operating in competition with our wholesalers, so to speak.

Q. Any others you can think of?—A. To the best of my recollection, no, Mr. Rooney.

28 Q. Now, do I understand, Mr. O'Leary, from your testimony now, that your only two wholesale customers are Crescent Material Service and the Brandin Slate Company?—A. No; I think—on asphalt roofing products, we are specifically on asphalt roofing products, are we, Mr. Rooney?

Q. I mean, on anything you sell, whether it's asphalt or asbestos.—A. Well, I would like to make clear, further, the difference between asphalt and asbestos products.

Q. All right.—A. On our asphalt products, under today's pricing policy, as a general rule, we sell carload and 10-ton quantities to the wholesaler, or jobber, who handles Ruberoid products chiefly on an exclusive basis, or the basis of CL price, less 6 and 5 percent. To the retail merchant, or roofing contractor, who, in general, complies with the definition that I gave in the foregoing testimony, on carload or 10-ton truck shipments, we give a 5-percent discount. Now, getting to our asbestos shingle pricing policy——

Q. Now, this you just mentioned is asphalt?—A. That is asphalt.

Q. All right. Now, go ahead. I'm sorry to have interrupted you.—A. In general, our policy is to classify so-called asbestos shingle distributors——

Mr. Rooney. What was that answer?

(The reporter read the answer as follows:

"A. In general, our policy is to classify so-called asbestos shingle distributors.")

A. Who buy and stock our asbestos roofing and siding
29 products, and generally handle them on an exclusive basis; have a sales organization for the development and promotion of the use of those products, and have those products available to the dealer and consumer trade.

Then, we have another group; another price. That is the men we classify as the asbestos shingle distributors, that we give our maximum 5 percent.

Q. Would you define——A. I defined the asbestos shingle distributor. His price is CL, 6 and 5 percent, on carload or 10-ton truck shipments.

Now, that discount may be extended to a concern who may classify themselves as wholesale, and may even function as such, or to a roofing contractor, or dealer, who performs the function of warehousing our materials, distributing them to the various classes of buyers, and promotes their use, usually on an exclusive basis.

Q. Now, what customers do you have in that classification?—A. In that classification, today, in New Orleans——

Q. Yes.—A. We have Brandin Slate Company, Hibernia Roofing and Metal Works, National Roofing Company, F. J. Villars, and Crescent Material Service.

Mr. Examiner, will you have the reporter read back to me those various people I listed under our asphalt categories? I am trying not to overlook anybody but I am dealing largely from memory rather than from notes, as you can see.

Trial Examiner BAYLY. Mr. Reporter, read that back and the witness can make a little note of what he's said, so he can clarify his answer.

Mr. ROONEY. Maybe if I put it this way, we can clear the record:

30 By Mr. ROONEY:

Q. Do I understand, Mr. O'Leary, you want to add to your list of wholesalers, at the present time, to Crescent Material Service and Brandin Slate Company, also——A. Cahn Bros. and Ryder.

Q. Cahn Bros. and Ryder?—A. Yes, sir.

Q. Now, I believe you had given the names of Brandin Slate, Hibernia Metal——A. As people whom we were selling in 1941. Is that right? Or, not '41, but prior to the war.

Mr. AIKEN. No; you were giving the names of your present asbestos distributors.

A. Oh, that is right.

By Mr. ROONEY:

Q. The last name you gave was Crescent Maferials.—A. That is five?

Q. That's right.—A. That's right.

Q. Now, did you, at any time, have other customers in that classification, on asbestos shingle distributors?—A. Yes, sir; on other occasions we have sold retail merchants or roofing contractors. In most instances for specific job requirements, on the basis of CL less 6 percent.

Q. Who was included in that group? Could you give us the names of those?—A. To the best of my knowledge, in that group were included A. H. White Roofing Company, Joseph Modenbach, Jordy Brothers, David Usner Sheet Metal Works. That's all I can recall without going back to my records.

31 Q. In order that it might be clear in the record, Mr. O'Leary, you distinguish between present customers and customers in the past. Is that right?—A. Yes. You are asking me to do that?

Q. Well, no. I say, you have. You have given us a list of present customers and you have given us a list of customers in the past.—A. Yes, sir; I have done it, Mr. Rooney, because war conditions brought about changes among that class of trade.

Q. Well, now, for example, do you sell, today, to Joseph Modenbach?—A. Directly?

Q. Yes.—A. No, sir.

Q. Do you sell to Jordy Brothers?—A. No, sir.

Q. Do you sell to A. H. White Roofing Company?—A. No, sir.

Q. Do you sell to David Usner Sheet Metal?—A. No, sir.

Q. Do you sell to Albert Brandin Slate Roofing Company?—A. No, sir.

Q. When did you stop selling them?—A. I don't know, without referring to our records. Might I point out that some of those concerns, to my knowledge, are out of business today?

Q. The A. H. White Roofing Company is out of business?—A. Yes, sir.

Q. How about David Usner?—A. I think, Mr. Rooney, that David Usner suspended operations during the war because the owner, or head, of that business was brought into the armed services. I believe that he has resumed operations now, but frankly, I am not familiar with the individual or intimately connected with the account.

32 Q. And Jordy Brothers, you say you are not selling to them?—A. I don't know whether or not they are operating. I am not familiar with them. Albert Brandin is dead, I believe. If I am not mistaken their business has been dissolved.

Mr. ROONEY. I would like to take a minute, your Honor.

Trial Examiner BAILY. Very well.

(A short recess was taken.)

Trial Examiner BAYLY. We will resume.

By Mr. ROONEY:

Q. Did you ever have a customer, the American Slate and Roofing Supply Company, that you know of?—A. I can't recall. We may have, but I would have to check our records.

Q. Do you know whether they are in business today or not?—A. No, sir; I am not acquainted, or have not been acquainted with that concern, personally, or otherwise.

Q. So these customers that come in within the classification that you have just given, the asphalt wholesalers, and the asphalt retail dealers, and the asbestos shingle distributors—they get those discounts, based upon those classifications?—A. Generally speaking, I would say that's so.

Q. Why do you say "generally speaking"? Are there any discounts they will get——A. No, sir; no, sir. No more favorable discounts, if that's what you mean, Mr. Rooney. No, sir.

Q. Well, would they get less?—A. I would say not. No, sir; not to my knowledge.

33 Q. And that, regardless of the quantity they bought?—A. In this New Orleans area, I would say that's yes; the answer to that would be yes.

Q. Now, do you—at the present time, are you selling asbestos shingles to any customers other than Hibernia, Brandin, National, Villars, and Crescent Materials?—A. Not that I know of, directly; no, sir.

Q. When did you stop selling other customers directly that you previously had sold?—A. Well, I explained previously, Mr. Rooney, that those times may have varied; we had changing conditions. I do know this particular group changed, that we talked about. I think they changed, probably right after the war started. I think that brought about some radical changes.

Q. In other words, they mostly went out of business?—A. Generally speaking, that is true. I hate to use the words "generally speaking," but that was true in most cases, with the possible exception of Modenbach. Usner, as I say, has come back into business, having come back from the armed service. I believe A. H. White, Albert Brandin (and I am not certain about Jordy Brothers), are no longer functioning, as concerns of that character.

Q. Now, these asbestos shingle distributors: they get this discount whether they are wholesalers or applicators?—A. That is possible, yes. They do, in New Orleans.

Q. Don't they in other places?—A. Other places? No. That may not be true. We may have some other condition that would dictate a slightly different price policy.

Q. Why is it in New Orleans and not in other places?—A. Because of competitive conditions.

34 Q. In other words in New Orleans you have a highly competitive condition among your customers?—A. Yes, sir; we have two local manufacturers of asbestos and cement products at New Orleans.

Q. Well, now, you are speaking of your own competitive—your own competitors or your customers'?—A. Our competitors.

Q. Your competitors?—A. Which bring about those competitive price conditions.

Q. In other words, your asbestos shingle distributors, in other places, don't get the same discount that the New Orleans distributor gets?—A. Yes; they do. Our asbestos shingle distributors in other places receive the same discounts, but I have pointed out—I wish to point out, in other localities, we may sell two accounts; say, if we are dealing with two accounts—usually we deal with one. If we deal with two accounts, one account may be a recognized wholesaler, and the other account will be specifically a retail merchant, and we provide a difference there——

Q. Now, that's——A. To the extent of 5 percent.

Q. That is what I am getting at. In other localities you would give a wholesaler his CL——A. That's 6 and 5 percent.

Q. 6 and 5 percent?—A. Yes, sir.

Q. You would give the retailer, CL at 5 percent?—A. Less 6 percent. CL less 6 percent. We are dealing with asbestos cement products.

Q. I am dealing with asbestos.—A. There is a difference of only 5 percent between the asbestos shingle distributor

35 and the retail merchant. We give the distributor 6 and 5; and we give the retail merchant 6.

Q. I see. So that the wholesaler gets 5 percent addition. In other localities, that is, than New Orleans?—A. That's right.

Q. Because you have, in those localities, either one or two dealers. You have a wholesaler—a wholesale customer and you have a retailer?—A. That's true.

Q. Here in New Orleans, you say, that all of them get the 6 and 5, whether they are wholesalers or whether they are applicators?—A. If they perform the functions and services as I have outlined in my definition of our asbestos distributor. In other words, buy and warehouse our materials and have a sales organization for promoting and developing its use, et cetera.

Q. But, they still may be applicators?—A. That's highly possible.

Q. They still may be applicators?—A. Oh, yes, sir; yes.

Q. So that your applicator, here in New Orleans, gets the additional 5 percent?—A. He may; yes, sir: that specific group of 4

who do application work receive that maximum discount, which is due to competitive conditions in this local area.

Q. Well, do you mean competitive between themselves?—A. Competitive between ourselves and other manufacturers of similar products.

Q. Well, how would that affect them as far as—wouldn't you have competitors in the other districts?—A. Yes, sir; we'd have competitors in the other districts, but they might not sell on the same basis in the other districts as they do in this local district, if I make myself clear.

36 Q. Frankly, you don't make it clear to me, Mr. O'Leary.—A. Well, they may have a policy in this local area of selling applicators, wholesalers, and retail merchants, who buy and stock their materials, et cetera, on their most favorable discount, which is 6 and 5 percent.

Q. To all?—A. To all those people they are selling—I say, they may do that. I am referring——

Q. I mean, do they or do they not? You are saying this is because of competitive conditions. Do they or don't they?—A. We know they do in the specific case of one customer; of one of our competitive manufacturers; yes, sir. We know that customer functions as an applicator and we have every reason to believe that he receives the maximum discount that may be available on the part of that manufacturer.

Q. You mean your competitor?—A. Our competitor.

Q. I mean, you only know of one instance?—A. I could cite, probably more instances, Mr. Rooney, but it is purely surmise, I'll grant you.

Q. Purely surmise.—A. Exactly. I have no circumstantial evidence to that effect.

Q. Well, isn't it a fact, Mr. O'Leary, that here in the New Orleans market, not from the manufacturer's standpoint, but from the customer's standpoint, it's a highly competitive line, among the dealers in asphalt and asbestos products?—A. Usually, yes. Specifically, today, no, on asbestos and cement products.

Q. Well, on asphalt products?—A. On asphalt products, as to some extent today, because of the existing condition of supply and demand which has brought about an entirely different picture insofar as the over-all competitive condition is concerned.

37 Q. And prior to the war you had a highly competitive condition?—A. Prior to the war, I'd say this was a highly competitive market; yes, sir.

Q. And when I say "highly competitive" I mean between dealers between applicators and purchasers of asbestos prod-

ucts.—A. I am not entirely familiar with that, Mr. Rooney, because my dealings are with our accounts, our dealers themselves.

Q. Yes.—A. And I know only what they tell me, of course. I know that, for instance, among the accounts that we have sold on that 6 and 5 basis, people with whom I am familiar because of my capacity, that the competition between those groups, plus similar groups sold by other manufacturers——

Q. Yes.—A. Was what you might term "keen."

Q. Yes.

* * * * * *

By Mr. ROONEY:

Q. Mr. O'Leary, when you left the stand this morning we were talking about the discounts of 6 percent and 5 percent which were given to wholesalers. Were there times when there was an additional discount of 2 and a half percent given to some of these customers?—A. Are you referring to asphalt products?

Q. Yes.—A. Yes; there was.

Q. And was that from January to April 1941?—A. As nearly as I can recall; yes.

38 Q. So that they got a 6 percent and 7½ percent?—A. That's correct.

Q. Do you know, offhand, what companies got that additional 2½ percent?—A. I think, Mr. Rooney, those discounts were extended to National Roofing Company, Hibernia Roofing and Metal Works, and J. Wilton Jones, during that 1941 period that you speak of.

Q. National Roofing?—A. Yes; and J. Wilton Jones.

Q. And Hibernia?—A. And Hibernia.

Q. What was the purpose of that additional 2½ percent?—A. To meet competitive conditions, to the best of my knowledge.

Q. Who was allowing an additional 2½ percent?—A. Specifically, it was reported to us that Flintkote was.

Q. Did you ever make any investigation to find out if that was a fact?—A. Other than I carefully questioned the representative—our representative who reported the situation to me, but, I might add, that it was purely a verbal situation and we had no opportunity to get written evidence of that competitive circumstance.

Q. Do you consider 2½ additional worth while, in your business?—A. I am not in position to answer that question, Mr. Rooney. That would be a matter of personal viewpoint, I think.

Q. In other words, you would have lost business if you hadn't given that additional discount?—A. It is highly possible we would. As a matter of fact, Mr. Rooney, I think I can elaborate

to this extent, that the reported competitive condition, to us, was 5 percent better, and in meeting the competition we didn't go all the way; we temporized to the extent of approximately half that amount.

39 Q. I mean, you felt you had to go that far?—A. Yes; we did.

Q. In other words, you would have lost business if you didn't give that other 2½?—A. We feel we would; yes.

Q. Well, you wouldn't have given it if you hadn't?—A. That's right. We feel we would have lost business had we not given that discount. Yes; very definitely.

Q. In other words, you felt the 2½ percent additional discount was such to your customers that if they didn't get it they would have taken their business elsewhere?—A. I feel that way about it; yes.

Q. So, you considered it important enough for your business to give it?—A. Yes.

Q. Your customers considered it important enough to demand it, or else they would have lost business?—A. That appears to be the case.

* * * * *

Mr. AIKEN. As to Exhibit 51, our copy does not show the pencil figures that appear to be on that photostat, that indicate that a 2-percent discount has been figured. I have no objection to the invoice itself, but we didn't put that on there.

Mr. ROONEY. Don't you give them 2-percent discount for cash? I don't mean for cash; I mean, within 10 days?

Mr. AIKEN. Whatever it is our answer admits it. Ap-

40 parently Mr. Brandin was figuring his own discount there. I don't care if it goes in, but as long as it is understood we don't do the figuring on it that is not in typing.

Trial Examiner BAYLY. Well, with that explanation in the record, the Trial Examiner will receive Commission's Exhibit 51 in evidence.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 51," was received in evidence.)

* * * * *

Mr. AIKEN. Your Honor, I have no objection to the introduction of Exhibits 52 through—53, 54, and 55. I note, however, on invoices—on Exhibits 53 and 55, there is a 2-percent calculation which is not on Ruberoid's copy of the invoice.

Trial Examiner BAYLY. That is a penciled notation, is it, Mr. Aiken?

Mr. AIKEN. That appears to be a penciled notation.

Now, as to a number of the invoices, they have had penciled notations on them, which do not appear to be germane to any issue of this case, but for purposes of clarity, I think the record ought to show that those notations were not put on those invoices by The Ruberoid Co. Apparently they have been put on by the customer for his own purpose.

Mr. ROONEY. They might have been put on by Mr. Hall; I don't know.

41 Trial Examiner BAYLY. Have you anything further to say to that statement?

Mr. ROONEY. No; I have nothing further to say to that.

Trial Examiner BAYLY. Obviously, any notation figuring commission on the invoice, when the price discount is shown—and that, I take it, is the purpose for which the Commission attorney is introducing these invoices—is not particularly important to the issues.

With that statement that Mr. Aiken has made, the Trial Examiner will receive Commission's Exhibits 52 to 55, inclusive, in evidence.

(The papers referred to, heretofore marked for identification "Commission's Exhibits 52, 53, 54, and 55," were received in evidence.)

Trial Examiner BAYLY. If there is no objection——

Mr. O'Leary, you have testified about the special discount period in '41, and certain price concessions, or discounts which were extended by Ruberoid to a number of these companies. Who set this price policy? Do you know?

The WITNESS. Well, that would be set by our executives, or executive heads; our New York office is our executive head office, and any special discount beyond—in a specific area to meet a condition such as a competitive condition, would have to

42 be approved by our headquarters at New York, in the final analysis.

Trial Examiner BAYLY. You were, and are, especially in sales?

The WITNESS. I am in sales at the present time, exclusively. During the period from the middle of 1940 through 1945 I was manager of the plant. I was manager of both the sales and manufacturing activities at Mobile for the Mobile District.

Trial Examiner BAYLY. Was there any specific change in your sales policy in the New Orleans area during this '41 period?

The WITNESS. No. I would say not.

Trial Examiner BAYLY. No special activities, in the way of sales; aggressive sales campaigns or anything of that kind?

The WITNESS. On our part, Mr. Bayly?

Trial Examiner BAYLY. On the part of Ruberoid.

The WITNESS. I would say not.

Trial Examiner BAYLY. Now, these invoices which are in evidence here: they represent actual executed sales. Is that your understanding?

The WITNESS. Yes, sir.

* * * * *

Trial Examiner BAYLY. Let the reporter show that this hearing is now in session at 10 a. m., March 8, 1946.

43 CHARLES H. DIETRICH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Would you state your full name?—A. Charles H. Dietrich.

Q. Where do you live?—A. 3015 Royal, business address 2830 North Rampart.

Q. New Orleans?—A. New Orleans.

Q. What is your business?—A. Lumber, building material, slate.

Q. How long have you been in that business?—A. Twenty-five years on the first of last month.

Q. In the course of your business, do you have occasion to use roofing material, asphalt roofing material, asbestos roofing material?—A. Yes, sir.

Q. Have you ever purchased any of that material from the Ruberoid Company?—A. Yes, sir.

Q. Do you still purchase from them?—A. Not for quite a while.

Q. How long since you have purchased anything?—A. About five years—four or five years.

Q. In that roofing business, did you have any other competitors in New Orleans?—A. Yes, sir.

Q. Would you tell us who they were?—A. The nearest one, Hibernia Roofing & Metal Works.

Q. Any others?—A. Brandin and Jordy Bros., National Roofing Company, Chissaniol.

44 Q. Would you say that the competition in the roofing business here in New Orleans was pretty keen?—A. It was, sir.

Trial Examiner BAYLY. Tell us what you mean by that word "competition." What was going on?

The WITNESS. Well, the business was done on a close margin.

By Mr. ROONEY:

Q. Would you want to elaborate a little more on that?—A. Well, for instance, you get a rate or a discount. For instance, if

the discount were 20 percent and 6 percent or 5 percent and if a party didn't get the 5-percent discount, or the 6-percent discount, he could lose the business. A job of $150.00, for instance; 6 percent of $150.00 would be $9.00 and that would cause him to lose that particular job.

Q. In other words, the competition was so keen that you had to figure pretty closely?—A. Yes, sir.

Trial Examiner BAYLY. This discount represented part of the profit or all of it?

The WITNESS. Wouldn't say it was part of the profit. It was a discount and eventually it would be a profit, but I would figure it as a cost.

By Mr. ROONEY:

Q. In purchasing from the Ruberoid Company, Mr. Dietrich, what discounts did you receive on the materials you bought?—A. According to my recollection, it was 20 percent.

45 Q. Any other discounts?—A. I think they were going to allow me a six-percent discount but I don't remember whether I received it or didn't receive it.

Q. Any other discounts than the 20 and 6 you have already mentioned?—A. Those are all I remember.

Q. Did you know of any of your competitors that got better discounts than you did?—A. I don't know exactly but I think the Hibernia received a better discount than I did.

Mr. AIKEN. I move to strike the answer as speculation.

Trial Examiner BAYLY. It may stand. It is his general idea; he was dealing here in this community. It may stand.

By Mr. ROONEY:

Q. Did you ever buy merchandise from the Ruberoid Company in carload lots?—A. Yes, sir.

Q. By buying in the carload lots, did you get any special discounts?—A. I bought one carload lot in which my discount was 20 percent.

Q. And everybody got that 20 percent?—A. Well, some got 20, some got 20 and 6.

Q. Yes, but you didn't even get the 6?—A. Not in that case that I remember.

Q. You say you haven't bought any materials for the last five years from the Ruberoid Company?—A. About five years.

Q. From the Ruberoid Company?—A. Yes, sir.

46 Q. Can you recall any specific job that you figured on that some of your competitors figured on that you didn't get?—A. Not right now.

Q. So you feel that had you received the additional six percent that you would have been in a better position than these competitors which you spoke about?—A. Yes, sir.

Q. I think that's all.

Cross-examination by Mr. AIKEN:

Q. I don't believe I quite understand the character of your business, Mr. Dietrich.—A. Lumber, roofing.

Q. Now when you say roofing and when you are talking about these purchases from Ruberoid, were they purchased by you for over the counter sales or did you go out and apply them on a contract basis?—A. Both.

Q. Well, which was the principal part of your business?—A. Roof applying.

Q. On a contract basis?—A. Yes, sir.

Q. What other kinds of roofs did you put on?—A. Slate, asbestos, tar paper, galvanized iron.

Q. Would you say that you had purchased any materials directly from Ruberoid since 1940?—A. About that time in Mobile.

Q. Now, I believe you said that on these purchases you got twenty percent and that you might have received an additional six percent but that you don't remember clearly whether you got the additional six percent?—A. Correct.

Q. It's true, isn't it Mr. Dietrich, that in the application of roofing materials, that is, where you go out and get a con-
47 tract job and bid on it, there are many other elements that are taken into consideration besides the materials themselves, that is, you have to figure your labor and overhead and other items of that kind and those of another into the contract price, isn't that true?—A. Well, they do, but the original purchase price is the principal one.

Mr. AIKEN. I see. I think that's all.

Redirect examination by Mr. ROONEY:

Q. Just one question, Mr. Dietrich. I show you Commission's Exhibit No. 56 for Identification and ask you if you can tell us what that is.—A. Yes, sir.

Q. Would you tell us what it is?—A. That was on a small shipment come by truck from Mobile, by the Herrin Lines.

Q. It's a copy of an invoice of merchandise purchased from the Ruberoid Company?—A. Yes, sir.

Q. I show you on that Commission's Exhibit No. 56 what appears in there in ink; was that put in by you?—A. I don't remember.

Q. You don't remember? The typewritten material on that was the invoice as it came from the Ruberoid Company. That wasn't put on by them?—A. Not that I remember.

Mr. ROONEY. I'd like to offer Commission's Exhibit No. 56 in evidence, if you please.

Trial Examiner BAYLY. Without objection——

Mr. AIKEN. Yes; I object.

Trial Examiner BAYLY. You mean you are offering it for identification?

48 Mr. ROONEY. No; I am offering it in evidence.

Trial Examiner BAYLY. Mr. Aiken.

Mr. AIKEN. I object to the offer, Your Honor. This is a copy of an invoice; we were not asked to produce it. I presume that the witness has the original. There's a discount figured on it, shown on the Commission's copy in pen and the witness doesn't seem to remember who put it on or why it was put on. This differs from all the other invoices that have been put in and there's a six-percent discount figured on the face of the invoice and the witness says in connection with this purchase——

Trial Examiner BAYLY. Just state your objection, no argument.

Mr. AIKEN. It isn't properly identified; a copy is not the best evidence.

Trial Examiner BAYLY. What do you say about that, Mr. Rooney?

Mr. ROONEY. I am rather interested, because only yesterday Mr. Aiken was very anxious to have it appear that all the invoices not received in evidence with the pencil and pen notations were not part of the Ruberoid's doings, so I take it that he feels a little different this morning and maybe the pencil notations on this is Ruberoid's—I don't know, but I assume that the same objection to the pencil notations on the invoice that he voiced yesterday would be raised to this one but apparently the tables have turned this morning and that he thinks the pencil notations might be theirs.

49 Trial Examiner BAYLY. The Trial Examiner is going to defer his ruling on this and we will consider it in connection with the other invoices handled in the same general manner. In the meantime, if you find it necessary, Mr. Rooney, to get the original, get the original.

By Mr. ROONEY:

Q. Mr. Dietrich, do you have the original copy of this invoice?—A. I think so, sir, I can find it.

Q. Would it be too much to ask you——A. I'll bring it.

Mr. ROONEY. I now withdraw Commission's Exhibit No. 56.

(The document heretofore marked "Commission's Exhibit 56" was withdrawn.)

Trial Examiner BAYLY. Any further questions of this witness:

Mr. AIKEN. Yes. When you come back, Mr. Dietrich, do you have any records from which you could tell how much you paid the Ruberoid Company on this invoice?

The WITNESS. I have the invoice itself.

Mr. AIKEN. Do you have any other record that shows how much money you paid them?

The WITNESS. I could get them together if you want.

Mr. AIKEN. Would you ascertain that fact before you come back?

The WITNESS. I will.

Mr. AIKEN. Thank you.

30 By Mr. ROONEY:

Q. I am showing you Commission's Exhibit 56 for Identification again. The net amount of $114.25, does that refresh your recollection as to how much you paid them?—A. No; that's five years ago.

Q. Does that help you refresh your recollection?—A. Except with the discount, it would help the discount.

Q. But you don't know whether you paid that $114.25 or $125.20?—A. Not right offhand.

Q. Would you have any records to show how much you did pay on that particular invoice?—A. I can get them, I think I can.

Q. When you bring those records, will you also bring a copy of letter dated May 11, 1940, addressed to the Ruberoid Company, in which you called their attention to the failure to allow you six percent discount.

Trial Examiner BAYLY. Mr. Dietrich, along the lines and questions Mr. Aiken was asking you, in connection with your dealings with Ruberoid, you were what they called an Applicator?

The WITNESS. Applicator and dealer.

Trial Examiner BAYLY. And you were working in this general New Orleans area?

The WITNESS. Yes, sir.

Trial Examiner BAYLY. And trying to get business with others, of other Applicators?

The WITNESS. Not with them but for myself.

Trial Examiner BAYLY. You were trying to get it for yourself and they were trying to get it for themselves?

The WITNESS. Yes.

51 Trial Examiner BAYLY. How extensively did you operate down there?

The WITNESS. Did a good deal of work in the lower section of the city.

Trial Examiner BAYLY. Mostly in the city of New Orleans, Louisiana?

The WITNESS. Yes, sir.

Trial Examiner BAYLY. Any other questions?

By Mr. ROONEY:

Q. Under the present day conditions, has building picked up?—A. Not in this line; I am out of it practically.

Q. Out of it practically now?—A. Yes. That discount helped to put me out.

Mr. ROONEY. That's all.

Trial Examiner ROONEY. Mr. Dietrich, you will be available Monday?

The WITNESS. Yes, sir.

By Mr. ROONEY:

Q. And you will bring those records?—A. Yes.

Mr. ROONEY. Then the witness is excused until Monday.

(Witness temporarily excused.)

52 CHARLES L. MODENBACH was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your name?—A. Charles L. Modenbach.

Q. Where do you live, Mr. Modenbach?—A. 1219 Antonine Street, New Orleans, Louisiana.

Q. What is your business?—A. I am a partner of Joseph Modenbach & Sons.

Q. And what type of business do you carry on?—A. Roofing and sheet metal.

Q. How long have you been in that business?—A. I continued from my father, he died in 1937, which he started in 1895.

Q. More or less brought up in that business.—A. Yes, sir.

Q. Will you tell us a little bit what your business consisted of and what type of work you do?—A. Repairing and reroofing buildings, sheet metal work in connection with the buildings.

Q. Did you at sometime purchase any materials from the Ruberoid Company?—A. I have, sir.

Q. And over how long a period of time?—A. I don't know; I think I started in '40 or '41.

Q. You started purchasing?—A. From Ruberoid Company.

Q. Now, in your roofing business, Mr. Modenbach, do you have any competitors here in New Orleans?—A. A

53 few, sir.

Q. Who are they?—A. Brandin Slate Company is a big competitor, Mr. Albert Brandin is dead now; Hibernia Roofing Company, National Roofing Company, Taylor-Seidenbach, Inc.

Q. What discounts, if any, did you receive from the Ruberoid Company?—A. I received six percent and two percent for cash.

Q. Would you say that the competition in your business was keen?—A. Very keen.

Q. So an additional five-percent discount would have been advantageous to you in the competitive situation?—A. Every little bit will help.

Q. Were other roofers who were competing with you, to your knowledge receiving additional discounts to what you were receiving?—A. I don't know, sir.

Mr. ROONEY. I think you may cross examine.

Cross-examination by Mr. AIKEN:

Q. Would you state in a little more detail, Mr. Modenbach, the character of your business?—A. Roofing and sheet metal work.

Q. Well, what kinds of roofing?—A. Slate roofing, asbestos roofing, sir, I couldn't do anything with asbestos, prices were high.

Q. The major part of your business has always been slate roofing, has it not?—A. Slate; yes, sir.

Q. Your purchases of asphalt and asbestos roofing products were only occasional, were they not?—A. When I could get it. I have lost a lot of jobs though.

54 Trial Examiner BAYLY. Why did you lose these jobs?

The WITNESS. I couldn't say, sir. I'd figure the job to try to make a profit. There's one job I took a chance on and I lost about $35.00 on it; it was a new building.

Trial Examiner BAYLY. I didn't want to interrupt you, Mr. Aiken, you go ahead.

By Mr. AIKEN:

Q. I think at times you purchased products, asphalt and asbestos products that were not made by Ruberoid, did you not?—A. Yes, sir. Very seldom bought a new roof except if the owner wanted Johns-Manville roofing I bought it from Taylor-Seidenbach, the material.

Q. In other words, you didn't buy from Johns-Manville, you bought from their distributor?—A. Yes, sir; their distributor.

Q. I see.—A. I tried to sell Ruberoid where I could and, of course, naturally you want to give the customer what he wants.

Q. I don't suppose you kept any stock of these products on hand, just order them when you had an order, is that right?—A. Sometimes I'd have a few bundles over, a square over, it wouldn't pay, you could get it in overnight at that time.

Mr. AIKEN. That's all.

Redirect examination by Mr. ROONEY:

Q. You said, I believe you mentioned a job you lost money on, is that right?—A. That's right, sir. One job particularly I lost on.

55 Q. I show you Commission's Exhibit No. 20.—A. Yes, sir.

Q. And that is invoice No. 9324?—A. Yes, sir.

Q. Was that material purchased for a particular job?—A. This top item was, $143.64.

Q. Do you recall whether you bid on a job in which that material was used?—A. Yes, sir; it was in Lake View and my price was $170.00 and I had other material to go with it. I had used the felt they had in stock and some ridge tiles.

Q. Did you make money on that job?—A. Lost $35.00.

Q. You have a subpoena to appear here today, Mr. Modenbach?—A. I have, sir.

Q. From the time you received that subpoena until this morning, were you invited to a conference with any representatives of the Ruberoid Company or their counsel?—A. I spoke with the two gentlemen here.

Q. Where was that?—A. At my home.

Q. Did they come out to see you?—A. Yes.

Q. Did they ask you if you'd been subpoenaed here?—A. Yes, sir.

Q. Did they say how many witnesses they'd been to see?—A. No, sir.

Q. Did they stay long?—A. About an hour; I couldn't say, maybe a half hour.

Mr. ROONEY. I think that's all.

Re-cross-examination by Mr. AIKEN:

Q. Just one other question. I think you said you bought the Johns-Manville products from Taylor-Seidenbach?—A. Taylor-Seidenbach was the distributor.

56 Q. He was also an Applicator, wasn't he?—A. Yes.

Q. On a roofing job he was a competitor?—A. Yes, sir.

* * * * *

FERNAND JOSEPH VILLARS, Sr., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Would you give us your full name, please, sir.—A. Fernand Joseph Villars, Sr.

Q. And you live where?—A. 41 Metairie Heights, Jefferson Parish.

Q. New Orleans?—A. They think it's New Orleans; we don't look at it that way yet.

Q. What is your business?—A. Roofing contractors.

Q. What is the firm name?—A. F. J. Villars & Sons.

Q. And your place of business is where?—A. 609 Metairie Road.

Q. New Orleans?—A. New Orleans.

Q. We have to say New Orleans because of the record. When it gets up to Washington, the street address doesn't mean anything.—A. That's okey.

Q. And what is the nature of your business?—A. Roofing and siding contractors.

Q. Now, in your roofing business, do you have other competitors in New Orleans?—A. Oh, yes; have quite a few.

Q. Would you name some of them?—A. Brandin Slate Company, Hibernia Sheet Metal Works, National Roofing
57 Company, Olympia Roofing Company, Crescent Materials—well, they're wholesalers, really not competitors, they don't put on roofs—and, well, Modenbach is a competitor in a way, mostly slates though, and Mr. Dietrich, I believe, but I very seldom come in competition with him.

Q. You purchased materials from the Ruberoid Company?—A. Yes, sir.

Q. And for how long?—A. It's been about seven or eight years, nine years, something like that.

Q. What discounts do you get?—A. Six and five.

Q. You are one of the favored boys?—A. Not that I know of; I didn't think I was one of them.

Q. You don't know anybody who got any better than that?—A. I don't.

Q. And you are solely a roofing Applicator?—A. That's correct.

Q. You don't sell at retail?—A. No, we don't get enough to sell.

Mr. ROONEY. That's all.

Cross-examination by Mr. AIKEN:

Q. When you say your discounts are six and five, Mr. Villars, what product are you talking about, asbestos?—A. Asbestos shingles and siding; not on the felts.

Q. Is that the present discount?—A. A privilege?

Q. Is the six and five the discount you are getting now?—A. No; it does not come on the invoice at all. We pay a straight price for it. You may have some of the invoices.

Q. That wasn't quite my question. Is six and five the discount you are getting on asbestos shingles now?—A. No; it is not.

58 There's really no discount outside of the two percent cash discount within ten days.

Q. What are your discounts? What discounts are you getting on asbestos shingles now?—A. None, outside of the two percent.

Q. You principally apply asbestos, do you not?—A. And siding likewise.

Q. Asbestos shingles?—A. Yes.

Q. You never applied much asphalt?—A. Once in a while we have a built-up roof.

Q. But that part of the business is comparatively small, compared to your asbestos part of the business?—A. That's right.

Q. You do use some asphalt products in connection with built-up roofs and applying your asbestos products?—A. That's correct.

Q. Sort of an accessory?—A. Necessary.

Q. You use Ruberoid products exclusively, do you not?—A. We do.

Q. And you have for several years?—A. That's right.

Q. You maintain a warehouse, do you not?—A. We do.

Q. And you keep Ruberoid products in stock?—A. That's right.

Q. You, I think, in times past, have probably sold a small amount of goods at retail, have you not, that is, just right out of your store?—A. At times, when we had it to sell but what we get now is we have more contracts than we can get roofing for.

Q. In other words, you don't sell at retail now because you don't get the stuff to sell, is that correct?—A. That's correct; yes, sir.

Mr. AIKEN. That's all.

59 Redirect examination by Mr. ROONEY:

Q. How much of a retail business did you ever do?—A. Well, not much; very little.

Q. And you weren't doing any retail business back in 1942, were you?—A. Well, as I say, very little.

Q. If any?—A. That's correct.

Q. Did you say you don't get any discounts now?—A. No discounts on the invoices at all.

Q. None on the invoices?—A. None known; no understanding as to any discount. We pay the regular straight prices.

Q. And you don't get any discounts at all?—A. None.

Q. None come on the invoices?—A. No.

Q. Mr. Hall doesn't come around and give you any?—A. No, sir.

* * * * * *

EDWARD C. CHASSANIOL, JR., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your full name?—A. Edward C. Chassaniol, Jr.

Q. Where do you reside?—A. 1708 Erato Street.

Q. In New Orleans?—A. New Orleans.

Q. And what is your business?—A. Roofing contrac-
60 tor, sheet metal work, siding.

Q. How long have you been in business?—A. Ten years.

Q. What does your business consist of mostly?—A. Roofing, built up roofing, asbestos shingles, siding.

Q. Do you have competitors in that business in New Orleans?—A. Yes, sir; I hope so.

Q. Name some of them.—A. National Roofing Company, Braifdin Slate Company, Villars & Sons, Olympia Roofing Company.

Q. Have you purchased material from the Ruberoid Company?—A. We have occasionally; yes, sir.

Q. I show you now Commission's Exhibits for Identification 28, 30, and 36 and ask you if you can tell us what they are, Mr. Chassaniol?

Trial Examiner BAYLY. Just a minute, that 30 is not in evidence.

Mr. ROONEY. None of these are; I said for identification.

A. I'd have to check, that is, I don't recall this. I'd have to check my records, we probably got some of that—probably all of it but I can't recall.

Q. Now, do you operate as an Applicator exclusively?—A. Yes, sir.

Q. Let me ask you one thing from these exhibits, Mr. Chassaniol, showing you Commission's Exhibits 28, 30, and 36 again and ask you to look at those to help you refresh your recollection as to the discount you received from the Ruberoid Company.—A. Those six percents are probably all right. We have gotten.
61 a lot of stuff through mixed cars, ordered two or three hundred rolls of felt and billed through the Crescent Materials for that stuff at two percent ten days.

Q. That's the only discount you got?—A. On that stuff, yes, sir.

Q. In your business as a roofing Applicator, is the competition keen?—A. Yes, sir; it is.

Q. Would discounts additional to the two percent that you spoke of and the six percent that appear on the exhibits be advantageous to you in figuring the job?—A. No, sir.

Q. Why not?—A. Our competition—we figure we have a union shop and we can't bid with an open shop bid, you see. Our labor costs us more money, insurance costs us more, competition just isn't fair against the open shops.

Q. If you got an additional five percent, it wouldn't help you?—A. In figuring against an open shop; no, sir.

Q. Would it against a nonopen shop?—A. Yes, sir; it would.

Q. Are you still getting material from the Ruberoid Company?—A. When I can.

Q. You mean you order from them, you handle their material exclusively?—A. Yes, sir.

Q. And you have tried to buy it direct from them?—A. I have, yes, sir.

Q. And you have been unable to?—A. That's correct.

Q. Now, are these competitors of yours that you mentioned, are they able to get material?—A. I understand they can get it.

Q. And such material of the Ruberoid Company that you get you have to get through somebody else?—A. Yes, sir.

62 Q. You can't buy it directly?—A. No, sir. They have shipped us some stuff in here occasionally but it's delivered in here in split cars and somebody gets some of it and billed to us through Crescent Materials.

Q. Crescent Material is a wholesaler?—A. That's correct.

Q. The others, Brandin Slate, National Roofing?—A. They are Applicators.

Q. So far as you know, they have materials?—A. They seem to put it on; I notice a lot of jobs being put on by National. They get the material; I don't know where they get it from.

Mr. ROONEY. Your witness.

Mr. AIKEN. I don't think I have any questions.

Trial Examiner BAYLY. Why can't you get materials?

The WITNESS. I don't know. They claim they can't ship me any, there's none available and I see a lot of roofs going on and I know Crescent Materials material being used on it.

Trial Examiner BAYLY. Any further questions?

By Mr. ROONEY:

Q. When you say Crescent Material, you mean Ruberoid?—A. Yes; I beg your pardon.

* * * * *

63 CARL O. LYLE, Jr., was thereupon called as a witness for the Commission and having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. What is your full name, please?—A. Carl O. Lyle, Jr.

Q. And where do you reside?—A. 5760 General Diaz.

Q. That is New Orleans?—A. Yes.

Q. What is your business?—A. Wholesale roofing and building specialties.

Q. How long have you been in that business?—A. Since 1928.

Q. Do you handle products of the Ruberoid Company?—A. Yes, sir.

Q. For how long?—A. Ever since I have been in business and before that time too.

Q. You do exclusively a wholesale business?—A. Yes, sir.

Q. What discounts do you receive from the Ruberoid Company?—A. Well, we got six and five on asbestos material and five and five on composition material.

Q. When you say that you mean the carload list price less six and five?—A. Yes, sir.

Q. Now, did you at any time receive any additional discounts than those that you mentioned?—A. No, sir.

Q. Didn't you at one time receive seven and a half percent?—A. The discounts have always changed from time to time, I don't remember what discounts; there's always been a different

64 discount applying to the roofing business. I have been in it all my life practically—since I was 14 or 15 years old, 16 and I don't remember when those other discounts were in effect.

Mr. ROONEY. I would like to have this exhibit marked for identification, "Commission's Exhibit 57."

(The paper referred to was marked "Commission's Exhibit 57" for Identification.)

Q. I show you Commission's Exhibit 57 for Identification and ask you if you can tell me what that document is?—A. I'd have to have a price sheet.

Q. I show you now several invoices and ask you if they help to refresh your recollection as to what Exhibit 57 is.—A. I don't know what this is unless they forgot to put some discount on an invoice. I'd have to get the records out or look back and see what the cost was, probably something we may have written them about that they failed to put it on the invoice.

Q. Let me ask you if this refreshes your recollection. Is that amount represented on Commission's Exhibit No. 57 for Identi-

fication, does that indicate an additional two and half percent discount for merchandise?—A. I just simply can't remember because like I say they changed discounts so much; looks like every year they used to change the discount some way. I couldn't tell you unless I figured it out.

Mr. AIKEN. If you let me look at it, maybe we can stipulate as to what it is.

(Commission's Exhibit 57 for Identification was submitted to Mr. Aiken for examination.)

65 Mr. AIKEN. May we go off the record?

Trial Examiner BAYLY. Off the record.

(Discussion off the record).

Trial Examiner BAYLY. On the record.

Mr. AIKEN. We would be willing to stipulate, I think that Commission's Exhibit 57 is a credit memorandum issued by the Ruberoid Company to Crescent Materials Service, New Orleans, Louisiana, dated February 28, 1941, and that the credit memorandum reflected a discount allowed Crescent Materials Service on "A" products, so-called, which is the asphalt group of products. We will also stipulate that this discount was on purchases of asphalt products during the month of February 1940.

Trial Examiner BAYLY. Amounting to what?

Mr. AIKEN. The amount is $48.25.

Trial Examiner BAYLY. In percentage what is it?

Mr. ROONEY. I believe—and that's what I was trying to determine through this witness—that it's two and a half percent additional that Mr. O'Leary mentioned on the stand yesterday. There was a period of time some wholesalers got seven and a half percent.

Mr. AIKEN. I think this credit memorandum represents two and a half percent of his purchases during that month.

Mr. ROONEY. In addition to the five percent previously given?

Mr. AIKEN. In addition to the discount shown on the invoices themselves.

66 Trial Examiner BAYLY. Is that satisfactory?

Mr. ROONEY. That's satisfactory.

The WITNESS. They have different groups, A, B, C, D, that these things come in.

Mr. ROONEY. I'd like to offer Commission's Exhibit 57 in evidence.

Trial Examiner BAYLY. Without objection, Commission's Exhibit 57 may be received.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 57," was received in evidence.

Mr. ROONEY. I think that's all.

Mr. AIKEN. Before the witness leaves the stand, I want to be perfectly fair, frank and open about this. I think, as a matter of fact——

Trial Examiner BAYLY. Are you making an objection?

Mr. AIKEN. I make an admission in evidence that this credit memorandum was an error and that the amount should have been twice that much and that we later issued another credit memorandum for exactly the same amount covering the same purchases for the same reason, so that the total discount that he was allowed on "A" products——

Trial Examiner BAYLY. Was twice that shown in 57?

Mr. AIKEN. In addition to the discount shown on the invoice, was exactly twice the amount shown on Commission's Exhibit 57.

Trial Examiner BAYLY. That's very fair.

67 Mr. ROONEY. I appreciate that very much but I simply thought I would have this witness show what this statement was.

Mr. AIKEN. We are not trying to cover up a thing.

* * * * * *

JULIAN J. LOEB was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Your full name, please.—A. Julian J. Loeb.

Q. Where do you reside?—A. 7904 Burke Street, New Orleans.

Q. What is your business?—A. The National Roofing & Siding Company.

Q. And that is located where?—A. 2631 South Clairborne Avenue, New Orleans.

Q. What business is the National Roofing Company in?—A. A roofing contractor and siding and a little sheet metal work.

Q. And when you say roofing contractor, do you mean roofing Applicator?—A. Yes, sir.

Q. The great amount of your work is done here in New Orleans?—A. Yes.

Q. Any outside of New Orleans?—A. Yes, sir; a little portion of it.

Q. Were do you do it?—A. Within a 75 mile radius of New Orleans; we do possibly three or four percent.

68 Q. In your roofing business, do you have other competitors in New Orleans?—A. Yes, sir.

Q. Would you tell us who they are?—A. Hibernia Roofing and Metal Works, Brandin Slate Company, Taylor-Seidenbach, Groesbeck-Clotworthy.

Q. And you have been buying your materials from the Ruberoid Company?—A. Yes, sir.

Q. For how long a time?—A. Since about ten years.

Q. Do you sell some of your material to other roofers?—A. Some; a small portion of it.

Q. The greater portion of your business is Applicator?—A. That's right.

Q. Would you say that the roofing business competition is rather keen in New Orleans?—A. Yes, sir.

Mr. ROONEY. Your witness, you may cross examine.

Cross-examination by Mr. AIKEN:

Q. You handled, before the war at least, handled Ruberoid products exclusively, didn't you?—A. Yes, sir.

Q. You maintain a warehouse, do you not?—A. Yes, sir; I do.

Q. You keep a substantial stock of materials on hand, do you not?—A. Yes, sir.

Q. And isn't it true that you have over the years endeavored to promote the use of Ruberoid products?—A. That's right, sir.

Mr. AIKEN. I think that's all.

69 Redirect examination by Mr. ROONEY:

Q. Just one question. Mr. Loeb, I believe you said the greater part of your business was as a roof Applicator, is that correct?—A. That's right.

Q. Would it be fair to say about ninety percent of your business would be as a roof Applicator?—A. Yes, sir.

Q. And to promote the commodities of Ruberoid among your customers who put on roofs?—A. It is to the public itself; we deal to the consumer.

Mr. ROONEY. Thank you; that's all.

Mr. AIKEN. That's all.

Trial Examiner BAYLY. Does counsel want this witness at any future time?

Mr. ROONEY. No.

Mr. AIKEN. No.

Trial Examiner BAYLY. You are excused then, Mr. Loeb.

(Witness excused.)

Mr. ROONEY. Mr. Siben.

JOHN J. SIBEN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you give us your full name, please?—A. John J. Siben.

70 Q. And you reside where?—A. 4026 Clematis.

Q. Would you state for the record New Orleans. When we read the record in Washington, we don't know where you are, sir.—A. New Orleans.

Q. What is your business?—A. I am the owner of the Hibernia Roofing & Metal Works.

Q. And they are located where?—A. 2265 St. Claude Avenue, New Orleans.

Q. And how long have you been in business?—A. Thirty-one years.

Q. And what does your business consist of primarily?—A. Roofing, siding, sheet metal work.

Q. Do you operate principally as a roof Applicator?—A. Principally we are; yes, sir. When I mean principally, I mean the majority of our material is used in the application of roofs.

Q. By you as a roofer?—A. That's right.

Q. Do you have others in the New Orleans area who are competing with you in that?—A. I consider every roofer a competitor and I'll name you a few of the principal competitors like Brandin Slate Company, National Roofing Company, Taylor-Seidenbach, Groesbeck-Clotworthy.

Q. And you buy your materials from the Ruberoid Company?—A. Exclusively.

Q. How long have you been purchasing from them?—A. Well, I guess since I started in business.

* * * * *

71 E. J. O'LEARY resumed the stand and testified further as follows:

Direct examination (continued) by Mr. ROONEY:

Q. Mr. O'Leary, I note that these price lists that you have produced are for Mobile.—A. Yes, sir.

Q. Are there price lists for other areas?—A. Yes, sir.

Q. And would you be familiar with the price lists in the other areas?—A. With our printed price schedules I am in a general sense; yes, sir.

Q. Do you know what other areas have price lists than Mobile?—A. Our Millis area; our New York City area; Erie, Pennsylvania; Chicago, Illinois; Minneapolis, Minnesota; Baltimore, Maryland; Mobile, Alabama; and a price list issued for the State of Texas.

Q. Now, would those price lists be available at your main office in New York?—A. Yes, sir.

Q. But apparently they are not identified?—A. Well, because, largely because a greater variety of products may be made at one plant than is made at another plant. Those bring about to the largest degree the variance in the actual price schedule.

Q. In other words, the same product would be the same price in all areas?—A. The same published price, that is substantially so; yes, sir.

Q. I am trying to be accurate. Would there be a variation in the price?—A. Speaking for today, no. In other words, our price lists that are published for the particular branches that I
72 speak of reflect exactly the same prices that are published for the Mobile branch on the products that the Mobile branch manufactures.

Q. Would your price in Mobile be the same price for a product manufactured in Millis, for example?—A. Yes.

Q. And the same price is published in the Millis list?—A. Yes, sir.

Q. Has that been true right along or is that just at the present time?—A. That has been— I am sorry that I have to use the word generally. On the front of our price lists we have indicated that under some conditions we might publish special prices for a specific locale in order to meet competition in a location and those published prices are available to the interested parties. I think that is printed on the front of price list 159, if I am not mistaken, Mr. Rooney.

Q. The reference you make is that "We may at times publish different prices for different localities according to competitive conditions. Upon request, we will furnish our published prices for any locality to anyone interested."—A. Yes, sir.

Q. So it is possible that a price list for some other area might be different than the Mobile price—the published price?—A. That would be a supplement issued to the regular published schedule for perhaps a short period of time.

Q. We might go back a little bit, Mr. O'Leary. There was some testimony this morning that might result in some confusion on these invoices and I notice in all the invoices I referred to, particularly to Commission's Exhibits 1 through 55, that there is mention of a 20 percent—or rather, I will put it this way—less 20.—A. Yes, sir.

73 Q. Would you explain that for the record?—A. Yes. Our published prices, published list prices on asbestos cement shingles are subject to a discount in carload or ten ton quantities of twenty and six percent.

Q. So that when there appears on the invoice—we take here Commission's Exhibit 54, for example.—A. Yes, sir.

Q. It's for 25 squares Snow White 12 inch Colonial siding. Then beneath that is 7.35, that's, seven dollars and thirty-five cents?—A. Yes, sir.

Q. List price?—A. Less twenty percent.

Q. Then carried over in the unit price would be $5.88.—A. Yes, sir; that reflects twenty percent discount from that $7.35 price.

Q. In addition to that six percent asbestos distributor's commission?—A. That's right.

Q. And when we were speaking during this testimony of six percent and five percent, it was in addition to that twenty percent?—A. Yes, sir.

Mr. ROONEY. I think that's all, Mr. O'Leary.

Trial Examiner BAYLY. Does each of these invoices show the net amount which the customer and consumer pays for the product?

The WITNESS. If correctly prepared by the billing department and presumably these invoices have been correctly prepared, the price shown at the bottom of the invoice or the resulting total price, is the net price paid by the customer in the case of all people where we have not extended an additional discount which
71 may be handled by credit memorandum form as has been shown by previous evidence submitted. All of our sales are subject to a two percent cash discount on the 10th of the following month. If they pay promptly they get a discount.

Trial Examiner BAYLY. If they pay on the 10th of the following month they get that?

The WITNESS. Yes, sir.

Mr. ROONEY. That's available to everyone?

The WITNESS. Oh, yes; yes, sir.

Trial Examiner BAYLY. Now, Mr. Rooney, for my information perhaps more than anybody else's, just briefly relate these price lists to the pleadings and translate them briefly in terms of what you are claiming for them.

Mr. AIKEN. Do you want to do that on the record?

Mr. ROONEY. They speak for themselves showing terms and conditions of sales. These price lists as offered here show up to——

Trial Examiner BAYLY. We are talking about Exhibits 58 to 63 and 63–A inclusive.

Mr. ROONEY. That's right. Exhibit 58 are prices listed September 20, 1939, up to July 12, 1941, containing no terms and conditions of sale. Price List No. 151, or Commission's Exhibits 59 and 59–A, show terms and conditions of sale. From July 12, 1941, to September 2, 1941, when the next price list was published and which is Commission's Exhibit No. 60, shows terms and conditions of sale which vary from the terms and conditions of sale as set forth in Commission's Exhibits 59 and 59–A. From Sep-
75 tember 2, 1941 to December 12, 1941, at which time a new price list was issued, which is identified as Commission's Exhibit 61, the terms and conditions of sale vary from those shown in Commission's Exhibit 60. From December 12, 1941, to January 31, 1942, at which time a new price list was published, and

identified as Commission's Exhibit 62, the terms and conditions of sale vary from those set forth in Commission's Exhibit 61.

From January 31, 1942, to January 21, 1943, at which time a new price list was issued, which is identified as Commission's Exhibits 63 and 63-A, the terms and conditions of sale vary from those set forth in Commission's Exhibit 62. That's the purpose of these price lists.

Trial Examiner BAYLY. Translating this over-all picture, what are you claiming for this variation of price?

Mr. ROONEY. I am not claiming anything other than that the Respondent shows it published the terms and conditions of sale at which these discounts are allowed. Now here they are.

* * * * *

CHARLES H. DIETRICH resumed the stand and testified further as follows:

Direct examination (continued) by Mr. ROONEY:

Q. Mr. Dietrich, do you now have with you an original invoice from the Ruberoid Company, No. 1649?—A. Yes, sir.

76 Q. May I see it, please?—A. Yes, sir.

Q. Would you take it? Do you need this any longer, Mr. Dietrich?—A. No; I can do without it. In relation to——

Q. We'll go into that further but do you need this any further?—A. No, sir.

Mr. ROONEY. I'd like to have it marked.

Trial Examiner BAYLY. That was 56 this morning, already identified, wasn't it?

Mr. ROONEY. 56 was identified as a copy and now is identified as the original.

Mr. AIKEN. I suggest it be marked 56, that will relieve the confusion. It's the same thing.

(The paper referred to was marked "Commission's Exhibit 56" for Identification.)

Trial Examiner BAYLY. It's identified, is that right?

Mr. ROONEY. Identified as the original invoice.

Trial Examiner BAYLY. And you are offering that in evidence?

Mr. ROONEY. Yes; if Your Honor please.

Trial Examiner BAYLY. Without objection, Commission's Exhibit 56 may be received in evidence.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 56," was received in evidence.)

By Mr. ROONEY:

Q. I will ask you, Mr. Dietrich, if the notations on this Exhibit 56 which appear in pen were put on by you?—A. It seems this was put in lead pencil and gone over with pen.

77 Q. Did you do that?—A. Yes, sir; those are my figures.

Q. As submitted by the Ruberoid Company, there was no discount of six percent allowed as you received the invoice?—A. I made a deduction according to that letter.

Q. It wasn't on the invoice when you received it?—A. No; I don't think so.

Q. You figured it out in pencil?—A. Yes, sir.

Q. So that the amount you paid on this invoice was $114.25?—A. Yes.

Q. That is shown on Commission's Exhibit 56?—A. Yes, sir.

Q. The amount requested by the invoice was $125.20?—A. Yes, sir.

Q. And you took off two percent on $136.80?—A. Yes, sir.

Q. And you took off an additional six percent on the $136.80?—A. Yes, sir.

Q. Now, did you write a letter to the company about their failure to give that six percent?—A. I wouldn't say it was the failure of the company. I'd say I wrote the company telling them that I had made the deduction on two percent for cash and taken six percent for distributor's commission.

Q. Is that a copy of the letter?—A. Yes, sir.

Mr. Rooney. I'd like to have it identified.

(The letter referred to was marked "Commission's Exhibit 64" for identification.)

Mr. Rooney. I'd like to offer in evidence Commission's Exhibit 64 which is a copy of a letter dated May 11, 1940, written by the witness, Mr. Dietrich, to the Ruberoid Company, Mobile, Alabama.

78 Trial Examiner Bayly. Without objection, it may be received.

(The letter referred to, heretofore marked for identification "Commission's Exhibit 64," was received in evidence.)

Mr. Rooney. That's all, Mr. Dietrich. Thank you very much.

Trial Examiner Bayly. Off the record.

(Discussion off the record.)

Trial Examiner Bayly: On the record.

By Mr. Rooney:

Q. Now, Mr. Dietrich, did you—I believe you testified that you made purchases of other products than those which are identified in Commission's Exhibit 56?—A. Yes, sir.

Q. Do you happen to have the invoices of any other purchases you made?—A. I have an invoice here, No. 2623, dated June 14, 1940, the first item, blue-black 16-inch hexagonal shingles I was charged $6.52 a square and I noted here in lead pencil at that time about six years ago the price should have been $6.32. The

third item of 50 squares of jade green 16 inch hexagonal shingles I was charged $6.72 a square and I have a lead pencil notation of $6.52. That would make a difference of $10.00 on each of those two items or $20.00 in all. I also have a lead pencil memorandum up here

"I should get a net price of $5.50; I should sell at $6.50; gross profit is only 37¢ a square."

79 Q. What was the total amount of the invoice?—A. $1,163.05, less discount $23.05.

Q. That discount is two percent cash, is it not?—A. Yes, sir.

Mr. ROONEY. I would like to have this numbered for identification.

(The paper referred to was marked "Commission's Exhibit 65" for Identification.)

Mr. ROONEY. I would like to offer Commission's Exhibit 65 in evidence, which is invoice No. 2623 dated June 14, 1940, for merchandise sold to the witness, Charles H. Dietrich.

Trial Examiner BAYLY. Without objection it may be received.

(The paper referred to, heretofore marked for identification "Commission's Exhibit 65," was received in evidence.)

Mr. ROONEY. That's all.

Mr. AIKEN. In connection with this witness' last testimony, I should like to introduce another price list which I will have marked Respondent's Exhibit No. 1.

(The price list referred to was marked "Respondent's Exhibit 1" for Identification.)

Mr. AIKEN. I'd like to offer in evidence Exhibit No. 1 which is the price list of the Ruberoid Company No. 40–A, dated January 24, 1940.

Trial Examiner BAYLY. Without objection, it may be received.

80 (The price list referred to, heretofore marked for identification "Respondent's Exhibit 1," was received in evidence.)

By Mr. ROONEY:

Q. Now, Mr. Dietrich, you made mention of the unit $6.52 which should have been $6.32, you made a pencil notation?—A. Yes.

Q. And the unit price of $6.72 which should have been $6.52?—A. Yes.

Q. What do you have at the heading of that, in pencil?—A. Old price.

Q. Do you mean that you offered them at the old prices or what?—A. No; I wanted to get a reduction according to the old

prices and here's a notation July 8, 1939, of the same old prices $6.32 and $6.52.

Q. You are comparing them with the old prices on your invoice?—A. With July 8, 1939, about 11 months previous to that.

Q. The price at that time was cheaper?—A. Yes.

Q. You don't mean then that the price of $6.52 and $6.72 wasn't the list price at the time you paid them?—A. It might have been, but I judged it by my old price, 11 months previously, which was $6.32 and $6.72, difference of twenty cents a square.

* * * * *

Trial Examiner BAYLY. Mr. Reporter, show that this hearing is now resumed at 10:00 a. m., Monday, March 11.

* * * * *

81 EUGENE J. LILLIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you state your full name, please, sir?—A. Eugene J. Lillis.

Q. And you reside where?—A. Where do I reside?

Q. Yes.—A. 1626 South Jeff Davis Parkway.

Q. New Orleans?—A. Yes.

Q. And what is your occupation, Mr. Lillis?—A. I am engaged in the roofing business.

Q. And you are President of the Brandin Slate Company?—A. I am the owner.

Q. And the place of business is located where, Mr. Lillis?—A. 1021 North Rampart, New Orleans.

Q. Would you give us a general outline of your business: what it consists of, the type of business it is?—A. I am in the roofing and siding business.

Q. Is your business confined to the New Orleans area?—A. At the present time; yes.

Q. At any other time, did you do business outside of New Orleans?—A. Before the war.

Q. Where?—A. All over the state.

Q. Did you do any business outside the state?—A. You mean, then?

Q. Yes.—A. Oh, I might have. I couldn't answer that, now.

82 Q. Any business you did outside the state would be either in Mississippi or Texas, or Alabama?—A. No. I might have done a few jobs on the coast, in Mississippi.

Q. Now, when you say that you are engaged in the roofing business, do you mean as a roofing contractor, or as an applicator?—A. I sell and apply.

Q. I beg your pardon.—A. I sell and apply.

Q. Sell and apply?—A. Yes.

Q. Now, do you have any other competitors in that business, that you know of?—A. Lots of them.

Q. Would you name some of them?—A. Well, I would say Taylor-Seidenbach—do you want some more names?

Q. Please.—A. Hibernia Roofing Company; National; Groesbeck-Clotworthy. Almost anybody in the city, in the roofing business, is a competitor of mine.

Q. Is competition pretty keen in that business?—A. It's fair.

Mr. ROONEY. Your witness.

Cross-examination by Mr. AIKEN:

Q. As far as your roofing products you use and sell are concerned, you handle Ruberoid products exclusively, do you not?—A. That is correct.

Q. And you maintain a warehouse, do you?—A. At that time—in '41, and back, you are speaking about?

Q. No; I am speaking about now.—A. Oh, at the present time I have a warehouse here, sure.

Q. And you have had a warehouse for several years?—A. Yes. Before the war I had one in Lafayette, and also one here.

83 Q. Lafayette where?—A. Louisiana.

Q. I see. And you maintain a stock of Ruberoid products?—A. At all times.

Q. And you endeavor to promote the sale and use of them, do you? Do you endeavor to promote the sale and use of Ruberoid products?—A. Oh, yes, I do; I have salesmen out doing that.

Q. Now, you say you sell and apply. Do you sell to other dealers, or to dealers in roofing products?—A. I do.

Mr. AIKEN. I think that's all.

Redirect examination by Mr. ROONEY:

Q. Mr. Lillis, what percentage of your business is as an applicator as against the retail?—A. You are speaking about the present time, or back?

Q. Back, and at the present time.—A. Well, I would say that before '41, I'd say I sold pretty near half of my merchandise. And, right now, I apply most of it.

Q. Apply most of it now?—A. Yes.

Q. So, when you say you promote the use of Ruberoid products you mean you try to interest the public in using Ruberoid material?—A. Oh, yes, sir. When I first took the Ruberoid line on

down here; I had a tough battle. Everybody thought that the asbestos shingle—when you said Ruberoid they thought it was a rubber or composition shingle. I had all kinds of competition trying to put the Ruberoid account over.

Q. When you sought business to put on roofs, you tried to convince them Ruberoid was the thing to put on?—A. No. You see, when I first took the Ruberoid line on down
84 here, the asbestos shingle was the hardest thing to sell, the Ruberoid asbestos shingle, here in town, because they had another brand that they called Eterna.

Q. Let me interrupt you a minute. Did you understand my question?

Trial Examiner BAYLY. Suppose the Reporter read that question of Mr. Rooney's to the witness.

(The reporter read the question as follows:

"Q. When you sought business to put on roofs, you tried to convince them Ruberoid was the thing to put on?")

The WITNESS. Yes; I tried. Sure.

By Mr. ROONEY:

Q. I mean, to people that would want to use that material on their building?—A. Yes. People called us up for an estimate on a roof, and we went out and figured the job, and our salesmen would have to go there with a sample of the asbestos shingle and convince the customer that that was as good a product as they could possibly buy.

Mr. ROONEY. That is all, Mr. Lillis.

Oh, only one other question: I understand that you waive any compensation for appearing as a witness?

The WITNESS. Yes.

Mr. AIKEN. That is all.

Trial Examiner BAYLY. You are excused, Mr. Lillis.

(Witness excused.)

85 DAVID A. USNER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Your full name, please?—A. David A. Usner.

Q. Where do you reside?—A. 2903 Constance.

Q. New Orleans?—A. New Orleans; yes, sir.

Q. Now, in 1941, were you operating the business of Usner Sheet Metal Works?—A. That's right, sir.

Q. At 2845 Magazine Street, New Orleans?—A. That's right.

Q. And would you tell us the type of business that you had?—A. We were applicators, mostly, and some roofing. It seems that we would take a roofing job to get the sheet metal job.

Q. When you speak of the sheet roofing job, you mean asbestos?—A. Asbestos, asphalt, and slate.

Q. And then, I believe you went into the service, did you?—A. I went into the service about—I'd say about April or May 1942.

Q. And when you went into the service you closed up your business?—A. My business has been closed.

Q. Now, back at that time, and the years prior to that, was the competition rather keen in the roofing business in New Orleans?—A. It had been; yes.

Q. Who was some of your competitors?—A. National Roofing Company; Brandin Slate Company; Holzer Sheet Metal Works.

* * * * *

86 HERBERT J. HONECKER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. For the record, would you state your full name, please?—A. Herbert J. Honecker.

Q. And your residence?—A. I live at 6818 Milne Street, New Orleans.

Q. And you are an Attorney Examiner of the Federal Trade Commission?—A. I am.

Q. And you are attached to the New Orleans office of the Federal Trade Commission?—A. Yes, sir.

Q. Mr. Honecker, did you, on February 18, 1942, interview a Frank A. Doerr [spelling] D-o-e-r-r, who is the owner of the American Slate and Roofing Supply Company, located at 326 South Diamond Street, New Orleans?—A. I interviewed him on that date, as nearly as I can recall.

Q. And was that at his place of business?—A. That was at his place of business at the time.

Q. When you called at his place of business, from your own observation, could tell us what type of business it was?—A. The place of business was in a large warehouse, one corner of which was set off for an office, and as I recall it, there was roofing——

Q. May I interrupt you: I meant the general type of business——

A. Oh, yes. It was obviously a roofing establishment.

87 Q. A roofing business?—A. Yes.

Q. As a result of——

Mr. ROONEY. Strike that.

By Mr. ROONEY:

Q. Did you sometime later, again, go to interview Mr. Doerr?—A. I attempted to.

Q. Were you able to locate him?—A. I was unable to locate him, either at his home or at his place of business.

Q. And you have been unable to locate him since that time?—A. I have seen nothing of him since.

Mr. ROONEY. Your witness.

Mr. AIKEN. No cross-examination.

Mr. ROONEY. That is all.

(Witness excused.)

Mr. ROONEY. Mr. Examiner, Mr. Doerr has now come in, in response to the subpoena issued, and I would like at this time to place him on the stand for examination.

Trial Examiner BAYLY. Very well. Call your witness.

Mr. ROONEY. Mr. Examiner, I don't want the closing now to contain the remarks I previously made, that the witness is not here.

Trial Examiner BAYLY. It will be obvious that he is in here and has testified.

88 FRANK A. DOERR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. ROONEY:

Q. Will you state your full name, please?—A. Frank A. Doerr.

Q. Where do you reside?—A. 2020 Broadway.

Q. New Orleans?—A. Yes, sir; New Orleans.

Q. What is your business?—A. Well, at present I am in the—that is, I am working for a roofing and installation material and dealer and contractor.

Q. Were you, at any time, in business for yourself, Mr. Doerr?—A. Yes; I was in business for a period, from September 1938 up until February 1942. At first, for a period of about eight months, as President of Jordy Bros. Roofing, Inc., and after that, until February 1942, as owner of the American Slate and Roofing Supply Company, 326 South Diamond Street, New Orleans.

Q. Have you been connected with the roofing business for some time, Mr. Doerr?—A. Full life.

Q. From 1938, Mr. Doerr, until 1942, would you give us a general outline of the type of business you were engaged in, and what you did?—A. Well, starting in September 1938 for a period of about eight months, I was managing and running the Jordy Bros. Roofing, Inc., and we retailed roofing materials of all kinds, asbestos shingles, rolled roofings, and everything in the roofing line.

Q. Now, would you be designated as a roof applicator?—A. And also, we—also, we operated as applicators, in connection with the selling of material.

89 Q. Yes.—A. And our selling of materials consisted of selling to dealers, lumber dealers, and other roofing companies around the city. And we did work, not only in New Orleans, but as far off as Florida.

Q. Did you have other competitors at that time, too?—A. The competition at that particular time, during this entire period of about four years, was extremely strong, due to labor conditions and the fact that there were so many companies entering into it—new companies entering into the business, here.

Q. Competition was keen?—A. Very keen.

Q. You say you went out of business in 1942?—A. 1942, on account of the business being unprofitable for sometime, and I didn't see any purpose in continuing in an unprofitable business.

Q. When you say unprofitable, do you mean competition was keen or——A. Well, not that the competition was so active, but the fact that you met up with lower prices, as a general thing, that you couldn't meet. And you were limited in your scope of selling on account of having to find people that were not good shoppers to sell to, because anybody that was a good shopper would find a lower price, as a general thing.

Q. So far as you know, were prices on——

Mr. ROONEY. Oh, strike that.

By Mr. ROONEY:

Q. Did you purchase material from the Ruberoid Company?—A. Yes; I purchased from the Ruberoid Company, through their local representative, John Hall.

90 Q. Who was their salesman?—A. John Hall was their salesman. He took the orders and he either mailed them in or phoned them in to his factory, in Mobile.

Q. Now, Mr. Doerr, so far as you know, or if you do know, were any of your competitors purchasing material from Ruberoid at more favorable prices than you were?—A. Well, I didn't actually see the invoices, but I have positive evidence—that is positive reason, in that——

Mr. AIKEN. Now, Your Honor, if this man is going to speculate, I object. The prices at which we sold these people are all in evidence. There is no reason to get his speculation in.

The WITNESS. Wait a minute——

Trial Examiner BAYLY: Now, you wait a minute.

Mr. ROONEY. Just a minute.

Trial Examiner BAYLY. Read Mr. Aiken's objection, please.

(The reporter read the objection as follows:

"Now, Your Honor, if this man is going to speculate, I object. The prices at which we sold these people are all in evidence. There is no reason to get his speculation in.")

The WITNESS. All right. I will——

Mr. ROONEY. Now, just wait a minute.

Trial Examiner BAYLY. Just wait until you are told to go on. What do you say to that, Mr. Rooney?

Mr. ROONEY. I have no objection to your ruling.

Trial Examiner BAYLY. The Trial Examiner is going to
91 permit the witness to answer the question, with the privilege appropriate time, to clear that up.

(To the witness.) You may answer the question.

Now, Mr. Reporter, read the question.

(The reporter read the question as follows:

"Q. Now, Mr. Doerr, so far as you know, or if you know, were any of you competitors purchasing material from Ruberoid at more favorable prices than you were?")

The WITNESS. Let me answer it this way, and then you can——

Trial Examiner BAYLY. You answer it the best way you can. Then, if you want to make an explanation of your answer, you may do so.

The WITNESS. I haven't seen any competitor's invoices who may have bought from Ruberoid Company, but I do know this: that at present, the prices of standard materials like Ruberoid others of the kind are, for example, in the case of Hexicon, 16 by 16 blue-black shingles, $5.75 per square, where I was charged, all during the years 1941 and 1940, $6.12 per square on this particular item. Also, in the case of blue-black 16 by 16 Dutchlap shingles, the present price to the dealer is $6.00 per square, whereas during the years of 1941 and '40—in 1940, I paid $6.44 per square:

That will fix you up.

92 By Mr. ROONEY:

Q. Now—— A. Now the prices—I will add to this: to the very best of my knowledge, the prices on nothing in the roofing line have decreased, but, on the other hand, if anything, they have all been subject to some increase, except possibly this particular item, but I am positive there was no decrease. That will fix you up.

Q. Now, do you remember any specific job that you didn't get because of the variance in price: that is, your price and the competitor's prices?—A. Numerous jobs. That was almost an every-day occurrence, those jobs—I can't recall offhand. It's natural in every business, even today. Every business loses jobs, daily, on account of price.

Q. If you had been able to purchase material from Ruberoid at the same prices as your competitors, would that have been to your advantage, in figuring,—— A. Certainly. Because, by paying a higher price for materials as compared to a competitor, my scope

of doing business, or my—my scope of doing business was limited. For instance, I couldn't sell a lumber dealer or another roofer that would come to me to buy material on account of prices being too high. On many occasions you'd lose an applied job on the basis of even a few dollars.

Q. Would a few dollars mean the difference—— A. Sometimes.

Q. Between getting the job and losing it?—A. Sometimes, one dollar makes a difference, where it's another reputable concern figuring—where it's another reputable concern figuring against you.

93 Q. I don't recall whether I asked you or not, but could you tell us who were some of your competitors when you were in business?—A. The principal competitor was Brandin Slate Company, on both dealer business and applied business, who did a business, exactly like mine. Then, also, The Crescent Material Service Company, who were supposed to be doing dealer business, but I am not quite so sure about that—that they did that.

Q. Any others?—A. National Roofing, who did a business exactly like mine, and then there were numerous other dealers, like myself, buying Ruberoid products, direct from Ruberoid Company.

Mr. ROONEY. I think you may inquire.

Cross-examination by Mr. AIKEN:

Q. Who do you work for now, Mr. Doerr?—A. Taylor-Seidenbach.

Mr. AIKEN. That is all.

Mr. ROONEY. That is all.

Trial Examiner BAYLY. Mr. Doerr, you claim you weren't getting as good prices as some of the other men in the same type of work. Is that right?

The WITNESS. I believe that. I am positive of it, although I can't—nobody handed me an invoice to show me, because, naturally, they wouldn't want to—they wouldn't want to give away their benefit, their advantage. They wouldn't want to tell their advantage.

Trial Examiner BAYLY. Do you know why you weren't as favored a buyer as others?

94 The WITNESS. No. I never—in fact, I was never told I wasn't as favored. I was always told, when the question came up, that I got exactly the same prices as everybody else. I was told that at least fifty times during the course of the four years.

Trial Examiner BAYLY. What was the general volume of your business? You were an applicator?

The WITNESS. Applicator and dealer.

Trial Examiner BAYLY. What was the general volume of your business?

The WITNESS. Well, it varied, and I'd just say, roughly, about a $1,000 a month. Sometimes it would run a few thousand, and sometimes practically nothing.

Trial Examiner BAYLY. Did you have warehousing facilities?

The WITNESS. Yes, sir; warehousing and office, and all the facilities that a dealer, an applicator, would be required to have, and I covered, not alone New Orleans, but the State of Louisiana, all over the State of Louisiana, clear to Texas—clear to Florida. And, I have jobs to show it.

Mr. ROONEY. Did you buy car—oh, pardon me, Mr. Examiner. I thought you were through.

Trial Examiner BAYLY. That is all right.

The WITNESS. And, much of our business was secured on the open, competitive bids, such as the United States Coast Guard, the W. P. A. Procurement.

95 By Mr. ROONEY:

Q. Did you buy in carload lots?—A. I ordered in carload lots. Sometimes a carload would come in, as a whole, but as a rule, in most cases it came in as less carload—in truckload lots, rather. I was told I was—I was told by the representative, that it didn't make any difference, that the truckload price would be the same as a carload price.

* * * * * *

Before Federal Trade Commission

Trial Examiner's Recommended Decision

June 28, 1948

I. PROCEEDINGS

On July 26, 1933, the Federal Trade Commission issued its complaint against The Ruberoid Company charging in substance price discrimination in the sale of roofing and insulating materials in violation of the Robinson-Patman Act.

Extensive hearings for the taking of testimony and receipt of documentary evidence were held, before Charles B. Bayly, Trial Examiner, in various parts of the United States. At the conclusion of the hearings the transcript and all documents pertaining to the proceedings were filed with the Federal Trade Com-

mission in Washington, D. C., and constitute the entire administrative record.

James I. Rooney appeared as counsel in support of the complaint, and William M. Aiken and Spencer Gordan (Covington, Burling, Rublee, Acheson & Shorb) appeared as counsel for the respondent.

Full opportunity was afforded the parties to present and defend their case, file briefs and make arguments.
96 Neither party desiring to offer further evidence and following conferences to simplify the issues, the record was formally closed on June 7, 1948. The Trial Examiner now makes his Report Upon The Evidence, Recommended Findings and Conclusions and Recommended Order, based upon the administrative record.

II. Pleadings and Issues

A. The Complaint and Answer

The Federal Trade Commission, believing The Ruberoid Company, a corporation, was and had been violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, issued its complaint on July 26, 1933, charging in substance that:

Par. 1. Respondent is a New Jersey Corporation with its main office at 500 Fifth Avenue, New York City; it is and has been since June 19, 1936, engaged in processing, manufacturing, offering for sale, selling and distributing asbestos and asphalt roofing, insulating materials and allied products throughout the United States; is one of the largest manufacturers and distributors of the product in the United States; maintains and operates branch warehouses in various cities; sells its product directly to wholesalers, retailers, and "applicators" who are also known as building or roofing contractors and apply the product to buildings, charging the consumer both for the material and labor required.

(The answer of respondent to Paragraph 1 filed September 27, 1943, refers to the respondent as The Ruberoid Co.; denies violation of the law as charged but admits all other statements therein.)

97 Par. 2. Respondent sells and distributes its product in interstate commerce, some initially from the point of production to purchasers situated in other states in a continuous flow in commerce and also from its warehouses to the purchasers thereof who thereupon resell and distribute it for use within the various states of the United States and the District of Columbia.

(Respondent's answer admits these statements.)

Par. 3. While conducting its business respondent, at all times, has been in substantial competition with other manufacturers of the product who for many years have been and are now likewise engaged in the production, sale and shipping of their product, in commerce, across state lines to buyers thereof located in various states of the United States; many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of the products, within the same several trade areas.

(Respondent's answer states that many of its customers are not competitively engaged at all times as charged in Paragraph 3.)

Par. 4. While operating as charged, since June 19, 1946, respondent has discriminated and continues to discriminate in price by selling different purchasers at higher prices than it sells products of like grade and quality to other customers competitively engaged in the resale of said products, within the same territory, with customers receiving the lower prices; grants all customers a cash discount of 2% if the invoice is paid within a specified time.

(The answer to Paragraph 4 denies any price discrimination; admits the cash discount as stated.)

98 Par. 5. This discrimination was through use of a trade discount schedule, selling some customers at higher prices than to others, in competition, goods of like grade and quality granting:

(a) a "distributor commission" ranging from 5% to 10% deducted from the invoice price and a "wholesale discount" of 5% from the invoice price. This latter discount went to favored customers and was in addition to the 5% to 10% discount granted the same customers;

(b) a "distributors commission" of 5% and in some cases 6% deducted from the invoice price and a "wholesale discount" of 6% off the invoice price which was in addition to the "distributor commission" of 5% and, in some instances, 6% was allowed to the same customers. Such commission and wholesaler discount were granted to some and withheld from other customers of respondent buying the product and in competition with each other.

(Respondent admits it grants wholesalers a 5% discount, above that granted retailers and applicators, which varied in time and place depending upon competitive conditions; denies discrimination in price between purchasers; says any differentials in price made only due allowance for differences in manufacturing cost, sale or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to the purchasers thereof and were made in good faith to meet equally

low prices of competitors; denies that the effect of any act done by it and charged in the complaint may be to substantially lessen competition or tend to create a monopoly in any line of commerce or injure competition: denying all charges not specifically admitted.)

(b) Whether the effect of such price discrimination as charged, in Paragraphs 4 and 5 of the complaint have been or may be substantially to lessen competition in commerce, as charged, and to injure or prevent competition between buyers receiving the benefit of such discriminatory prices and those from whom they were withheld,

The effect also has been or may be to tend to create a monopoly in those favored purchasers in the said line of commerce in the trade areas where they and their disfavored competitors operate.

Such price discriminations by respondent between buyers of the product of like grade and quality while operating in interstate commerce, as charged, violate the law.

(Respondent denies all the allegations of Paragraph 6 of the complaint.)

B. The Issues

The issues in conflict within the framework of the pleadings are:

(a) Whether price discriminations were granted by respondent to some purchasers while being withheld from others, who, as its customers, were competitively engaged with each other in the same general trade area;

(b) Whether the effect of such price discrimination as charged if found to exist, has been or may be, substantially, to lessen competition in interstate commerce, as charged, and to injure or prevent competition between such favored buyers and those from whom discriminatory prices were withheld;

(c) Whether or not such acts and practices, on the part
100 of respondent, as charged, and if found to exist, have had the effect or may tend to create a monopoly in favored purchasers while carrying on interstate commerce, in the product, in the same general trade areas, where they and their less favored competitors operate.

C. The Product

Respondent Ruberoid Company is one of the largest manufacturers and distributors of asbestos and asphalt roofing insulating materials in the United States. It processes, sells and distributes its products through operating branch warehouses and sales offices in various cities. It sells its product to wholesalers, retailers

and "applicators." The latter are roofing contractors and generally apply the product to buildings under a contract arrangement whereby the consumer pays both for the material and labor cost.

D. Interstate Character of Business

Respondent Ruberoid Company, a corporation is organized and operating under the laws of the State of New Jersey, with its principal office located at 500 Fifth Avenue, New York City, in the State of New York.

As one of the largest producers and distributors of the products in the United States, it operates branch warehouses and sales offices in Maryland, Alabama, Pennsylvania, Massachusetts and Illinois.

It sells and distributes its products in commerce between and among various states of the United States and in the District of Columbia from the state of production, shipping its products to the purchasers thereof, into and through other states of the United States, maintaining a continuous current of trade in interstate commerce between its plants and warehouses to the
101 purchasers thereof for use and resale within such various other states and the District of Columbia.

III. Report Upon the Evidence

Counsel in support of the complaint in conferences with counsel for the respondent, following a series of discussions and informal hearings before the Trial Examiner, were able to and agreed upon the following facts and conclusions which are embodied in written form, dated April 26, 1948, signed by respective counsel filed and made a part of the record.

The Trial Examiner accepts these findings of fact and conclusions, adopts them and specifically finds the following which are based upon substantial evidence:

A. Discrimination in Sales to Retailers and Applicators

On March 12, 1941, respondent sold A. H. White Roofing Company, 17 squares of jade green 16-inch hexagonal asbestos roofing shingles at $6.72 per square and granted a 6% distributor's commission on this item. On March 13, 1941, respondent sold National Roofing Company, 25 squares of the same type of shingles as it sold the A. H. White Company at $6.72 per square, and granted it both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 1 and 2).

On March 17, 1941, respondent sold A. H. White Roofing Company, 15 rolls of 30-pound asphalt felt at $1.50 a roll and granted

a 6% wholesaler's discount on this item. On the same date, respondent sold F. J. Villars & Son, 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at $1.50
102 a roll and granted it both a 6% wholesaler's discount and a 5% competitive discount (Com. Exs. 3 and 4).

On January 3, 1941, respondent sold David Usner Sheet Metal Works, 10 rolls of 30-pound asphalt felt at $1.50 per roll and granted a 6% wholesaler's discount on this item. On the same date, respondent sold the Brandin Slate Company, 45 rolls of the same type asphalt felt as it sold Usner Company, at $1.50 per roll and granted both a 6% wholesaler's discount and a 5% competitive discount on this item (Com. Exs. 5 and 6).

On January 15, 1941, respondent sold Jordy Brothers, 23 squares of blue-black hexagonal asbestos roofing shingles at $6.52 per square and granted a 6% distributor's commission on this item. On the same date, respondent sold National Roofing Company, 10 squares of the same type of shingle that it sold Jordy Brothers at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 7 and 8).

On January 28, 1941, respondent sold David Usner Sheet Metal Works, 20 squares of tile red dutchlap asbestos roofing shingles at $6.84 per square and granted a 6% distributor's commission on this item. On the same date, respondent sold Hibernia Roofing Company, 20 squares of tile red dutchlap asbestos roofing shingles at $6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 9 and 10).

On May 3, 1941, respondent sold A. H. White Roofing Company, 25 rolls of 15-pound asphalt felt at $1.42 per roll. On the same date, respondent sold Brandin Slate Company 50 rolls of the
103 same type of asphalt felt at $1.42 per roll and granted a 5% competitive discount on this item (Com. Exs. 11 and 12).

On August 4, 1941, respondent sold David Usner Sheet Metal Works, 26 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted a 6% distributor's commission on this item. On July 29, 1941, respondent sold Brandin Slate Company, 146 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 13 and 14).

On February 8, 1941, respondent sold Jordy Brothers, 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company, 15 squares of the same type of shingle at $6.52 per square and granted a 6% distributor's commission on

this item. On February 7, 1941, respondent sold Brandin Slate Company, 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 15, 16, and 17).

On April 7, 1941, respondent sold Jordy Brothers, 15 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted a 6% distributor's commission. On the same date, respondent sold to Brandin Slate Company, 8 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 18 and 19).

On May 2, 1941, respondent sold Joseph Modenbach & Sons, 21 squares of blue-black dutchlap asbestos roofing shingles at
104 $6.84 per square and granted a 6% distributor's commission. On the same date it sold F. J. Villars & Son, 40 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 20 and 21).

On May 23, 1941, respondent sold David Usner Sheet Metal Works, 24 squares of blue-black 16-inch hexagonal asbestos roofing shingles at $6.52 per square and granted a 6% distributor's commission. On May 21, 1941, it sold National Roofing Company, 50 squares of the same type of shingles at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 22 and 23).

On April 24, 1941, respondent sold Jordy Brothers, 27 squares blue-black 16-inch hexagonal asbestos roofing shingles at $6.52 per square and granted a 6% distributor's commission. On April 23, 1941, respondent sold Brandin Slate Company, 70 squares of the same type of shingles at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 24 and 25).

On September 29, 1941, respondent sold A. H. White Roofing Company, 50 rolls of 15 pound asphalt felt at $1.66 per roll. On the same date, it sold the National Roofing Company, 50 rolls of the same type of felt at $1.66 per roll and granted a 5% competitive discount (Com. Exs. 26 and 27).

On January 22, 1941, respondent sold Chassanial Roofing Company, 20 squares of blue-black dutchlap asbestos roofing shingles
105 at $6.84 per square and granted a 6% distributor's commission. On January 27, 1941, it sold Hibernia Roofing Company, 103 squares of blue-black dutchlap asbestos roofing shingles at $6.84 per square and granted both a 6% distributor's

commission and a 5% wholesaler's discount (Com. Exs. 28 and 29).

On February 1, 1941, respondent sold Chassanial Roofing Company, 32 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at $6.50 per square and granted a 6% distributor's commission. On the same date it sold Hibernia Roofing Company, 53 squares of the same type of shingles at $6.52 per square and granted both a 6% distributor's commission and the 5% wholesaler's discount (Com. Exs. 30 and 31).

On February 19, 1941, respondent sold David Usner Sheet Metal Works, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 a square and granted a 6% distributor's commission. On the same date it sold both Brandin Slate Company 16 squares and National Roofing Company, 50 squares of the same type of shingles that it sold Usner at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 33, 34, and 35).

On January 7, 1941, respondent sold Chassanial Roofing Company, 35 squares blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 per square and granted a 6% distributor's commission. On January 9, 1941, it sold National Roofing Company, 50 squares of the same type of shingles at $6.52 per square and granted it a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 36 and 37).

On June 30, 1941, respondent sold Joseph Modenbach & Sons, 30 rolls 30-pound asphalt felt at $1.50 a roll. On June 24, 1941, respondent sold National Roofing Company, 75 rolls of this same type of asphalt felt at $1.50 a roll and granted a 5% competitive discount (Com. Exs. 38 and 39).

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On August 4, 1941, respondent sold Joseph Modenbach & Sons, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 per square and 30 rolls of 30-pound asphalt felt at $1.58 per roll and granted a 6% distributor's commission on the shingles. On August 23, 1941, respondent sold E. J. Villars & Son, 22 squares of the same type of shingles at $6.52 per square and 65 rolls of the same type of asphalt felt at $1.58 per roll and granted a 6% distributor's commission and a 5% wholesaler's discount on the shingles and a 5% competitive discount on the asphalt felt (Com. Exs. 40 and 41).

On April 4, 1941, respondent sold A. H. White Roofing Company, 27 squares of Snow White 12-inch asbestos weatherboard siding at $5.88 per square and granted a 6% distributor's commission. On the same date it sold to National Roofing Company, 40 squares of the same type of siding at $5.88 per square and granted

both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 42 and 43).

On April 16, 1941, respondent sold A. H. White Company, 40 squares of Snow White, 10-inch asbestos colonial siding at $5.88 per square, and granted a 6% distributor's commission. On April 17, 1941, it sold National Roofing Company, 20 squares of the same type of siding at $5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 44 and 45).

On April 22, 1941, respondent sold A. H. White Company, 50 squares of Snow White, 12-inch asbestos colonial
107 siding at $5.88 per square and granted a 6% distributor's commission. On the same date it sold the National Roofing Company 3 squares of the same type of siding at $5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 46 and 47).

On June 9, 1941, respondent sold A. H. White Company, 15 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 per square and 100 feet of blue-black, 16-inch asbestos section starters at $3.72 per 100 feet and granted a 6% distributor's commission on these items. On June 6, 1941, respondent sold National Roofing Company, 28 squares of the same type of shingles at $6.52 per square and 183.3 feet of the same type of blue-black starters at $3.72 per 100 feet and granted both a 6% distributor's commission and a 5% wholesaler's discount on these two items (Com. Exs. 48, 49A and 49B).

On June 3, 1941, respondent sold A. H. White Roofing Company 200 feet of colonial gray 4 x 16 asbestos starters at 80¢ per 100 feet and granted a 6% distributor's commission. On the same date it sold Brandin Slate Company, 2,000 feet of the same type of starters at 80¢ per 100 feet and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 50 and 51).

On May 31, 1941, respondent sold David Usner Sheet Metal Works, 50 rolls of 30-pound asphalt felt and 25 rolls of 15-pound asphalt felt at $1.42 a roll. On May 24, 1941, it sold F. J. Villars & Son, 200 rolls of 30-pound asphalt felt and 150 rolls of 15-pound felt at $1.42 a roll and granted a 5% competitive discount (Com. Exs. 52 and 53).

On May 13, 1941, respondent sold A. H. White Roofing Company, 25 squares of Snow White 12-inch asbestos colo-
108 nial siding at $5.88 per square and granted a 6% distributor's commission. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at $5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 54 and 55).

In New Orleans, Louisiana, respondent granted wholesale discounts on asbestos products to retail dealers and applicators who warehoused them and promoted them on an exclusive basis, as well as to wholesalers (Tr. 26, 31, 32, 33, 34). Until about April 1, 1941, respondent granted a 6% wholesaler's discount to all New Orleans purchasers of asphalt products (Com. Exs. 1, 2, 3, 4, 6, 15, 30, 32, 33, 34). This discount was not granted on sales of asphalt products made after April 1, 1941 (Com. Exs. 11, 12, 19, 20, 21, 23, 25, 26, 27, 38, 39, 40, 41, 47, 48, 49, 49A, 50, 52, 53). As heretofore set forth in this paragraph respondent granted a 5% competitive discount on asphalt to some of the customers referred to in this paragraph and not to others, which, during the period said 6% wholesale discount was given, was in addition to said wholesale discount.

Some customers of the respondent were allowed an additional 2½% discount during the period from January to April, 1941 (Tr. 41).

The respective purchasers of respondent's products enumerated herein were competing in the resale of these products, as roofing contractors or so-called "applicators" (Tr. 88, 96, 110, 113, 138, 148) and as retailers (Tr. 96).

The competition among these customers of the respondent in the sale of respondent's products was keen and as a result
109 those customers receiving preferential discounts had a competitive advantage over these customers to whom the preferential discounts were denied.

(These facts are judicially admitted.)

The effect of the discrimination in price as found above has been substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between the purchasers receiving the benefit of said discriminatory prices and those from whom they were withheld. The effect also has been, or may be, to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various localities or trade areas in the United States where said favored customers and their competitors who are denied the prefere tial discount are engaged in business.

(These facts are judicially admitted.)

B. CONFLICT AS TO DISCRIMINATION IN SALES TO WHOLESALERS

(a) Contentions by counsel for respondent

The foregoing findings of facts and conclusions including price discriminations granted by respondent, to some of its buyers while

being withheld from others, who as customers were competitively engaged with each other in the same general trade area were judicially admitted, except as to wholesalers.

While thus admitting price discriminations at the applicator and retailer levels, counsel for respondent (Tr. 179) contends that the record does not show any wholesaler was given a better price than another and that there was no price discrimination at the wholesale level; the fact that there were other discriminations warrants neither an inference nor presumption that respondent will so discriminate between wholesalers in the future;

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therefore that the words: "and as wholesalers" (Tr. 148) sought to be included in the proposed findings of facts and conclusion, by counsel in support of the complaint, in the next to the last subparagraph of Paragraph Four on Page 7, should be eliminated.

These words ("and as wholesalers") were eliminated in respondent's proposed findings of fact and conclusion. (This is the only remaining issue of fact in conflict. There is ambiguity in the record between the designation used by respondent of its purchasers and the functions of such.)

Respondent further contends that the evidence adduced fails to establish discrimination at the wholesale level, that is discrimination in favor of one wholesaler against another wholesaler (Tr. 184);

that there must be two or more sales to customers in competition with each other;

that a few nonfavored-customers said they sold small quantities of the product at retail but none were wholesalers; in the finding "and as wholesalers" should be deleted (Tr. 185);

that the testimony of Mr. Loeb, taken as a whole, does not show that National Roofing Company was a wholesaler. It was an applicator (Tr. 186);

that it sold a small portion only of the material purchased to other roofers (Tr. 111);

> 111

that an "applicator" is one who "sells respondent's product to consumers on a contract basis, charging the consumer for the material used and the labor employed in connection with the applying of * * * the materials to buildings;

ninety (90%) of National's business was as a roof applicator (Tr. 111, requoted Tr. 187);

that the 6% discount on asphalt products as a wholesaler's discount had nothing to do with the function of the purchaser; all nonfavored customers got this discount and neither such customers nor Ruberoid thought they were wholesalers (Tr. 189).

On the other hand counsel in support of the complaint refers to the following testimony and contends as follows:

Ernest J. O'Leary, general sales manager of the southern division for respondent, when asked how respondent classified its customers, replied, "in general the classification was grouped in two parts. Part 1 * * * the wholesaler or jobber or wholesale distributor * * * a particular group; 2 retail merchants * * * lumber and building material dealers, hardware dealers, roofing contractors, or applicators" (Tr. 8).

"In the New Orleans area * * * as wholesalers of our asphalt products we classify Crescent Material Service and Brandon Slate Company. * * * that is all we classify as wholesalers" (Tr. 21).

Referring to asphalt products where discounts of 6% and 5% were given to wholesalers he said there were times when additional discounts of 2½% were given some customers. This was during the period from January to April 1941. They got 6% and 7½% (Tr. 7).

112 Companies getting additional 2½% discounts were National Roofing Company, Hibernia Roofing and Metal Works, and J. Wilton Jones (Tr. 40);

Julian J. Loeb, with the National Roofing and Siding Company, 2631 South Clairborne Avenue, New Orleans, engaged primarily as a roofing contractor or an applicator, says they sold a small portion of material to other roofers but the greater part of the business was as an applicator (Tr. 110);

While Mr. Carl O. Lyle, Jr. of the Crescent Material was testifying counsel for respondent stipulated that

CX 57 is a credit memo issued by Ruberoid to Crescent Service of New Orleans dated 2/28/41 allowing a discount on the asphalt group of products making a total of 6% plus 5% and 2½% maximum (Tr. 106);

Mr. O'Leary in response to a question put by the Trial Examiner, as to whether certain invoices offered in evidence showed the net amount paid by the customer and consumer, replied:

"If correctly prepared * * * and presumably these invoices have been correctly prepared, the price shown at the bottom of the invoice * * * is the net price paid by the customer in the case of all people where we have not extended an additional discount * * * " (Tr. 124);

There is ambiguity and confusion in the designation or label used on some customers in relation to their functioning. Some were getting favored price discounts over competing customers.

113 O'Leary says: "And we have another group, another price * * * we classify as asbestos shingle distributors where we give our maximum 5% * * * I define the asbestos shingle distributors price as CL-6 and 5 on carload and ten-ton shipments.

Now, that may be extended to a concern that may classify themselves as wholesale, and may even function as such, or to a roofing contractor or dealer who performs the function of warehousing our materials, distributing them to the various classes of business and promotes their use, usually on an exclusive basis" (Tr. 25).

Thus it is contended that while labeled "wholesalers" they were doing an applicating business in the case of

Brandon Slate
Hibernia and National

An additional 2½% price discount was given to National Roofing, Hibernia and J. Wilton Jones. National and Hibernia were competing with customers who were not receiving such discounts (Tr. 25 and contentions of counsel, Tr. 174–6).

Counsel in support of the complaint further contends that the gravamen of the offense is price discount discrimination where you have competing customers. You may call them any name you desire (Tr. 176).

C. PURCHASERS FUNCTIONING IN MORE THAN ONE CLASS.

On the issue of fact in conflict as to whether there is substantial evidence shown by the record regarding any price discrimination by the respondent in sales to wholesalers, there is uncertainty. This is due to the fact that the purchasers operated competitively and were designated as belonging to one class while functioning, at times, in such manner as to warrant another class designation. From the evidence it appears that one purchaser from respondent was the National Roofing and Siding Company, engaged competitively, primarily as a roofing contractor or applicator, but sold small portions of the product to other roofers. To this extent it functioned as a wholesaler, but did not enjoy the same prices as those given by respondent to Crescent Material Service. Crescent was classified as a wholesaler.

On the other hand Crescent seems to have gotten discounts on the purchase price from respondent which Brandon Slate did not get.

O'Leary, general sales manager for the Southern division for respondent, classed Brandon Slate as a wholesaler whereas Brandon functioned as an applicator.

Respondent urges there is not conclusive evidence shown that any wholesaler was given a favored price over another so as to warrant a finding of discrimination in price between wholesalers and for this reason any order should not include the class "wholesaler." While admitting discriminations at the retailer and applicator levels such acts warrant neither an inference nor a pre-

sumption that respondent will so discriminate between wholesalers in the future.

The fact that respondent operated illegally in certain relations by granting price discriminations at the applicator and retailer level does not warrant, it is asserted, the assumption that it may likewise operate illegally as to wholesalers, in the future, so as to justify including a prohibition in any order from granting discriminations to wholesalers.

115 If respondent has not discriminated between wholesalers, it has violated no provision of the Act as to such purchasers.

Obviously it cannot be assumed, in the absence of substantial evidence of a threat, that it expects to discriminate, at such level, in the future. The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. It will then not grant price discriminations to its competing wholesale customers, within the same general trade areas where the defined effect on commerce is shown.

The effect of such evidence as is shown regarding discrimination at the wholesale level, or purchasers who may have functioned temporarily as such, might have been further eroded away had respondent offered any rebuttal evidence showing such acts were inadvertent, in isolated cases only, and limited as to time, volume, and the area involved. It offered no evidence in explanation or justification of such acts.

D. DISCRIMINATION IN SALES TO PURCHASERS WHO FUNCTIONED IN TWO CLASSES FOUND

The Trial Examiner finds from the entire record there is not sufficient substantial evidence of two or more sales showing price discrimination by respondent as to wholesalers. He further finds there is not sufficient evidence of an immediate threat, based on past conduct, to justify an order specifically restraining respondent and limiting the order to restraint from anticipated future price discriminations as to wholesalers.

However, where a respondent is found to have discriminated in price an order may properly require cessation

116 from such specific practice, directed against such practice and the purchasers as a class, or any class where the basic element of functionally related illegal conduct in the form of price discrimination has been shown.

To make the order effective it may be in the alternative and include the restraint of prohibited acts as well as requiring affirmative conduct. It is necessary to cover the evil found to exist and restraint of incidental acts necessary to achieve the main objective.

The power to correct evils should be coextensive with the responsibility imposed.

The incidental acts should bear resemblance to those found to be unlawful, within the provisions of the specific statute under which the charge was brought and found to have been violated. To justify such proposed inclusion in an order, the record should show, in addition to the acts committed, danger of future commission through sales to the same purchasers or others related if of different names but all within the direct prohibitions of the statute involved or reasonably necessary to accomplish the preventive result desired, which in the instant case is price discrimination at any level.

By a prohibitory order, respondent is put on notice that discriminatory discounts granted to retailers and applicators is unlawful and would also likewise be unlawful if granted to any other purchasers similarly situated under whatsoever name.

The order should contain an inhibition against respondent selling its products to any purchasers, however designated by either the seller or purchaser as a class, who in fact functions in such same class with others competitively engaged, for higher
117 prices than the prices charged such others thereof who in fact actually compete with them in the sale and distribution of such products.

Respondent admits discrimination at the retailer and applicator levels.

The basic evil related to be eliminated is discrimination at any level.

Respondent is presumed to want to operate legally and refrain from any future discrimination. Therefore restraint against any discrimination will work no hardship on respondent.

With jurisdiction of the parties and being fully informed, inclusion of a restraint provision against any discrimination in an order, will discharge the Commission's full duty and prevent future evil.

It is therefore further found from the record that there was price discrimination in sales by respondent to purchasers functioning in other than the one generally designated class. Such favored purchasers functioned in more than one group, competitively in the same trade area, substantially affected commerce therein and may tend to create a monopoly. The order should contain a provision restraining this evil through sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such.

Such provision will correct the price discrimination at any level of conduct.

118 IV. RECOMMENDED FINDINGS AND CONCLUSIONS

1. Paragraph One. Basis of authority and charges preferred.

The Federal Trade Commission, by virtue of the authority vested in it, and believing The Ruberoid Company, a corporation, was and had been violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, issued its complaint, on July 26, 1946, against such corporation, respondent, charging in substance that it had discriminated in price in the sale of roofing and insulating materials in violation of such Act.

2. Paragraph Two. The issues in conflict

The issues in conflict within the framework of the pleadings are:

(a) Discrimination.—Whether price discriminations were granted by respondent to some purchasers while being withheld from others, who as its customers, were competitively engaged with each other in the same general trade area;

(b) Effect on Interstate Commerce.—Whether the effect of such price discriminations as charged, if found to exist, has been or may be, substantially to lessen competition in interstate commerce, as charged, and to injure or prevent competition between such favored buyers and those from whom discriminatory prices were withheld;

119 (c) Monopoly.—Whether or not such acts and practices on the part of respondent, as charged and if found to exist, have had the effect or may tend to create a monopoly in favored purchasers while carrying on interstate commerce, in the product in the same general trade areas, where they and their less-favored competitors operate.

3. Paragraph Three. The hearings and record.—Hearings for the receipt of evidence were held in various parts of the country. Full opportunity was afforded counsel for the respective parties to offer evidence, file briefs, to confer informally and be heard on oral argument.

The Trial Examiner being fully informed and after due consideration of the entire administration record, hereby makes his recommended decision and form of order.

4. Paragraph Four. The type of business.—Respondent, Ruberoid Company, is a New Jersey corporation maintaining its principal office for the conduct of its business at 500 Fifth Avenue in New York City. It is engaged in processing, manufacturing, selling and distributing asbestos, asphalt roofing, insulating materials, and allied products in all parts of the United States.

5. Paragraph Five. Scope of the business.—It is one of the largest manufacturers and distributors of the products involved in the United States. It has branch warehouses and sales offices in Maryland, Alabama, Pennsylvania, Massachusetts and
120 Illinois selling its products directly to wholesalers, retailers, and applicators. The term "applicator" is applied to any purchaser who thereafter sells the products to consumers, usually on a contract basis, and charges them for both the material used and the labor required in applying the materials to the buildings. This type of operator, purchasing the products, also refers to building or roofing contractors.

6. Paragraph Six. Interstate aspects.—Respondent sells and distributes its products in commerce from the point of origin in New Jersey, shipping such to purchasers located in various other states of the United States and the District of Columbia. It has maintained a continuous flow of trade in interstate commerce, in such products from its plants or warehouses to the purchasers thereof so located.

7. Paragraph Seven. Competition.—While thus engaged respondent is in substantial competition with other manufacturers and sellers of the same products who are likewise conducting an interstate business therein.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the various general trade areas.

8. Paragraph Eight. Differentials in price.—Respondent granted price differentials when selling some of its purchasers while withholding such favors from others who were competing in the same trade areas in the purchase and sale of the same type of product. These were granted to retailers and applica-
121 tors and are admitted by respondent. Some such sufficient to show the pattern are as follows:

On March 12, 1941, respondent sold A. H. White Roofing Company, 17 squares of jade green 16-inch hexagonal asbestos roofing shingles at $6.72 per square and granted a 6% distributor's commission on this item. On March 13, 1941, respondent sold National Roofing Company, 25 squares of the same type of shingles as it sold the A. H. White Company at $6.72 per square, and granted it both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 1 and 2).

On March 17, 1941, respondent sold A. H. White Roofing Company, 15 rolls of 30-pound asphalt felt at $1.50 a roll and granted a 6% wholesaler's discount on this item. On the same date, respondent sold F. J. Villars & Son, 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at $1.50 a

roll and granted it both a 6% wholesaler's discount and a 5% competitive discount (Com. Exs. 3 and 4).

On February 8, 1941, respondent sold Jordy Brothers, 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company, 15 squares of the same type of shingle at $6.52 per square and granted a 6% distributor's commission on this item. On February 7, 1941, respondent sold Brandin Slate Company, 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at $6.52 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount on this item (Com. Exs. 15, 16 and 17).

On September 29, 1941, respondent sold A. H. White Roofing Company, 50 rolls of 15-pound asphalt felt at $1.66
122 per roll. On the same date, it sold the National Roofing Company, 50 rolls of the same type of felt at $1.66 per roll and granted a 5% competitive discount (Com. Exs. 26 and 27).

On June 30, 1941, respondent sold Joseph Modenbach & Sons, 30 rolls 30-pound asphalt felt at $1.50 a roll. On June 24, 1941, respondent sold National Roofing Company 75 rolls of this same type of asphalt felt at $1.50 a roll and granted a 5% competitive discount (Com. Exs. 38 and 39).

On August 4, 1941, respondent sold Joseph Modenbach & Sons, 25 squares blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 per square and 30 rolls of 30-pound asphalt felt at $1.58 per roll and granted a 6% distributor's commission on the shingles. On August 23, 1941, respondent sold F. J. Villars & Son, 22 squares of the same type of shingles at $6.52 per square and 65 rolls of the same type of asphalt felt at $1.58 per roll and granted a 6% distributor's commission and a 5% wholesaler's discount on the shingles and a 5% competitive discount on the asphalt felt (Com. Exs. 40 and 41).

On April 22, 1941, respondent sold A. H. White Company, 50 squares of Snow White, 12-inch asbestos colonial sidings at $5.88 per square and granted a 6% distributor's commission. On the same date it sold the National Roofing Company 3 squares of the same type of siding at $5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 46 and 47).

On May 13, 1941, respondent sold A. H. White Roofing Company, 25 squares of Snow White 12-inch asbestos colonial siding
at $5.88 per square and granted a 6% distributor's commis-
123 sion. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at $5.88 per square and granted both a 6% distributor's commission and a 5% wholesaler's discount (Com. Exs. 54 and 55).

9. Paragraph Nine. Discrimination as to retailers and applicators admitted.

Discrimination as to retailers and applicators who resold the products purchased from respondent, to consumers on a contract arrangement covering both the cost of material and labor, has been judicially admitted and is so found.

The evidence as to discrimination at the wholesale level is in conflict. Ambiguity arises from the function of the purchaser in relation to his designation as a class.

A. RESPECTIVE VIEWS OF COUNSEL REGARDING DISCRIMINATION AS TO WHOLESALERS

Counsel for respondent urges: there must be two or more sales to wholesalers, customers and who are in competition with each other in order to establish price discrimination between such; that the weight of the evidence does not support a finding of discrimination by respondent against wholesalers: therefore an order should not include a prohibition against discriminatory sales to wholesalers as a class.

Counsel in support of the complaint contends: that there is evidence that some of respondent's customers conduct a wholesale business although the major part thereof is that of a retailer or applicator; that while this evidence may not be as conclusive as that showing price discrimination at the retail and applicator levels, it is uncontradicted; that too narrow
124 adherence to the technical classification of purchasers without consideration of their functions, might preclude corrective action under this proceeding, where subsequent discriminations, between competing customers, occurred; that the gravamen of the offense is price discrimination where you have competing customers; and that you may call such purchasers any name you desire.

B. COMMENT OF THE TRIAL EXAMINER

On this issue of fact in conflict there is confusion. This is due because purchasers were designated as belonging to one class while functioning at times, in such manner as to indicate another class designation.

National Roofing, engaged primarily as a roofing contractor or applicator, sold small quantities of the product to other roofers. Thus while functioning as a wholesaler it did not enjoy the same prices as those granted by respondent to Crescent which was classed as a wholesaler.

Crescent enjoyed favored discounts over Brandon Slate. Respondent's manager classed Brandon as a wholesaler, whereas it functioned as an applicator.

The fact that respondent operated illegally in certain sales to retailers and applicators does not warrant the assumption that it will so operate in the future, as to wholesalers. This is especially cogent in the absence of substantial evidence of threat.

The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. Respondent will then neither grant price discriminations to competing wholesalers nor to any purchasers however designated where the defined effect on commerce is shown.

125 Upon consideration of the entire administrative record, the Trial Examiner is of the opinion and it is accordingly found that there is not sufficient substantial evidence showing two or more sales by respondent at discriminatory prices to wholesalers nor is there sufficient evidence of a threat based on past conduct, to justify a provision in an order restraining respondent and limited in the order to anticipated future price discriminations strictly to sales to wholesalers.

Where discrimination has been found, the order should specifically restrain respondent from such practice in making sales to purchasers as a class or any class where the basic related element, functionally, of illegal conduct in price discrimination exists. It is necessary to cover the evil found to exist and restrain incidental acts essential to achieve the end sought. The power to correct evils should be coextensive with the responsibility imposed.

The incidental acts should be related to those found to be unlawful and within the specific provisions of the statute violated. Further, danger of future violations by sales to the same purchasers or others related even if of a different class, should be shown to exist. The objective is to prevent price discrimination, at any level and under whatever class the purchaser is functioning, irrespective of his designation.

We have discrimination at the retailer and applicator level. Since respondent is presumed both to want to operate within the area of legality and avoid future discriminations inclusion of a restraint provision, in an order, will visit no hardship. With jurisdiction of the parties and being fully informed inclusion of such restraint provision in an order will discharge the duty imposed by the statute and prevent future evil.

126 C. FINDING OF DISCRIMINATION IN SALES DUE TO DUAL FUNCTIONING BY PURCHASERS

The Trial Examiner is of the further opinion and it is therefore found and concluded that discrimination existed in other than the class groups designated which were retailers and ap-

plicators. That favored purchasers functioned in more than one trade group competitively, in the same trade area which substantially affected commerce therein and may tend to create a monopoly.

The order should contain a provision restraining this evil by preventing sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such.

10. Paragraph Ten. Effect on Interstate Commerce

The effect of the discrimination in price, found herein, has been substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between the purchasers receiving the benefit of said discriminatory prices and those from whom they were withheld. The effect also has been, or may be, to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various trade areas in the United States where said favored customers and their competitors who are denied the preferential discount are engaged in business.

11. Conclusion

The aforesaid discriminations in price by the respondent,
127 as herein found, constitute violations of subsection (a) of Section 2 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act of Congress approved June 19, 1936 (Robinson-Patman Act).

Having made a recommended decision covering findings of subordinate facts, ultimate conclusions of fact and law, based upon the entire administrative record, the Trial Examiner now recommends the following order be issued.

V. Order to Cease and Desist

It is ordered, that the respondent, The Ruberoid Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the sale of asbestos and asphalt roofing, insulating materials and allied products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality as among purchasers:

1. By selling said products to some retailers thereof for higher prices than the prices charged other retailers thereof who in fact compete with them in the sale and distribution of such products.

2. By selling said products to some "applicators" thereof at prices higher than the prices charged other "applicators" thereof who in fact compete with them in the sale and distribution of such products.

3. By selling said products to retailers and applicators or either who also function as wholesalers by reselling such product,
128 for higher prices than the prices charged others competing with them in the same respective group classification in the sale and distribution of such products.

4. By selling said products to any purchaser, however designated, who in fact functions as a class the same as others competitively engaged, for higher prices than the prices charged such others thereof who in fact compete with them in the sale and distribution of such products.

It is further ordered, that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Respectfully submitted.

Charles B. Bayly,
CHARLES B. BAYLY,
Trial Examiner.

CBB:ib.

129 BEFORE FEDERAL TRADE COMMISSION

Exceptions to the Trial Examiner's recommended decision by counsel in support of the complaint

July 22, 1948

Now comes counsel in support of the complaint and files his exceptions to the trial examiner's recommended decision, as follows:

One. Exception is taken to the following finding:

"The fact that respondent operated illegally in certain sales to retailers and applicators does not warrant the assumption that it will so operate in the future, as to wholesalers. This is especially cogent in the absence of substantial evidence of threat" (p. 21, paragraph 4, of subdivision B, of paragraph 9).

The fact that the respondent did operate illegally by discriminating in price between its customers, as borne out by overwhelming evidence and as conceded by the respondent, warrants the opposite assumption to that found by the trial examiner. The facts warrant the assumption that the respondent will operate

illegally in the future irrespective of the functional classification of its customers.

Two. Exception is taken to the following finding:

"The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. Respondent will then neither grant price discriminations to competing wholesalers nor to any purchasers however designated where the defined effect on commerce is shown" (p. 21, paragraph 5, of subdivision B, of paragraph 9).

This presumption could only prevail in the absence of any evidence of illegal practices by the respondent. It is completely overcome by the evidence of the discrimina-
130 tory practices of the respondent in selling to its customers.

This finding stems from the generosity of the trial examiner rather than from the record in this proceeding.

Three. Exception is taken to the following finding:

"Upon consideration of the entire administrative record, the Trial Examiner is of the opinion and it is accordingly found that there is not sufficient substantial evidence showing two or more sales by respondent at discriminatory prices to wholesalers nor is there sufficient evidence of a threat based on past conduct, to justify a provision in an order restraining respondent and limited in the order to anticipated future price discriminations strictly to sales to wholesalers" (p. 21, paragraph 6, of subdivision B, of paragraph 9).

The uncontradicted evidence shows that National Roofing (Tr. 110) and American Slate and Roofing Company (Tr. 148) were competing as wholesalers, at least in a portion of their business, along with Crescent Materials.

The findings of the trial examiner, as enumerated in exceptions 1, 2, and 3, are not consistent with his finding in subsection C of paragraph Nine (p. 22) wherein he properly found and concluded:

"That discrimination existed in other than the class group designated which were retailers and applicators."

In view of the additional findings made by the trial examiner to those enumerated in exceptions 1, 2 and 3 and appear-
ing in subsection B of paragraph Nine (pp. 20–21),
131 together with his recommended order to cease and desist, the Commission should not seriously consider the findings referred to in exceptions 1, 2, and 3. These particular findings must be considered as a charitable gesture on the part of the trial examiner towards the respondent.

Four. Exception is taken to the failure of the trial examiner to find that respective purchasers of respondent's products were

competing in the resale of these products as "wholesalers," as well as retailers and so-called applicators.

Five. Exception is taken to the following finding:

"The Trial Examiner finds from the entire record there is not sufficient substantial evidence of two or more sales showing price discrimination by respondent as to wholesalers. He further finds there is not sufficient evidence of an immediate threat, based on past conduct, to justify an order specifically restraining respondent and limiting the order to restraint from anticipated future price discriminations as to wholesalers" (p. 15, 1st paragraph, subdivision D).

This is the same exception as referred to in exception No. 3.

Six. The following paragraph appears on page 14, 8th paragraph, subdivision C:

"* * * The presumption is that the officers of respondent, as good citizens, both desire to and will operate within the area of legality. It will then not grant price discriminations to
132 its competing wholesale customers, within the same general trade areas where the defined effect on commerce is shown."

If the foregoing statement is a specific finding made by the trial examiner, then an exception is taken thereto and this exception is embodied in exception 2. On the other hand, if this is merely a restatement of contention by counsel for the respondent, of course, no exception is taken.

Respectfully submitted.

James I. Rooney,
JAMES I. ROONEY,
Counsel in Support of the Complaint.

JIR:mc.

BEFORE FEDERAL TRADE COMMISSION

Exceptions of The Ruberoid Company, respondent, to the recommended decision of the Trial Examiner

Now comes the respondent, The Ruberoid Company, and files the following exceptions to the recommended decision of the Trial Examiner in the above entitled proceeding, which recommended decision was served on counsel for the respondent July 14, 1948:

1. Exception is taken to the statement that extensive hearings were held for the taking of testimony and receipt of documentary evidence in various parts of the United States (Rec. Dec., p. 1). The only hearing at which evidence was presented was in New Orleans, Louisiana, March 7, 8, and 11, 1946 (Tr. 1–156 inc.).

It was followed by short hearings in Washington, D. C.,
133 at which no further evidence was introduced, but at which the evidence was closed and arguments were made to the Trial Examiner (Tr. 156–192 inc.).

2. Exception is taken to the statement that the complaint was issued on July 26, 1933 (Rec. Dec., p. 2). The complaint was issued July 26, 1943.

3. Exception is taken to Subparagraph C entitled "The Product" (Rec. Dec., p. 4) in that it does not state that the respondent sold asbestos and asphalt products in a different manner and with different discounts (Tr. 10, 11, 24, 25, 26, Rec. Dec., pp. 5–10).

4. Exception is taken to the statement, "There is ambiguity in the record between the designation used by respondent of its purchasers and the functions of such" (Rec. Dec., p. 11). Respondent contends that there is no such ambiguity (Tr. 21–34, inc., 80, 85, 87, 94, 100, 104, 110, 111, 113, 139, 140, 141, 143, 154).

5. Exception is taken to the form of the quotation which indicates that Crescent Materials Service and Brandin Slate Company were classified as wholesalers in the New Orleans area (Rec. Dec., p. 12). The word "presently" (Tr. 21) is omitted. Brandin Slate Company was classified as a wholesaler of asphalt products only by Mr. O'Leary (Tr. 21). Mr. O'Leary spoke as of 1946 (Tr. 21). The evidence as to discriminations does not relate to any period after 1942. The record does not show that Brandin Slate Company got any larger discount on asphalt products than applicators and retailers, nor does it show that Brandin wholesaled asphalt products (Rec. Dec., pp. 5–10, inc.; Tr.
134 138–141). Brandin was not classified a wholesaler of asbestos products (Tr. 26).

6. Exception is taken to the statement that discounts of 6% and 5% were given to wholesalers (Rec. Dec., p. 12). These discounts were given to retailers and applicators as well (See Rec. Dec., p. 10, and references to transcript therein).

7. Exception is taken to the statement that CX 57 is a credit memo issued by Ruberoid to Crescent Materials Service of New Orleans dated 2/28/41 allowing a discount on the asphalt group of products making a total of 6% plus 5% and 2½% maximum (Rec. Dec., p. 12). The evidence fails to show what discounts Crescent was given (Tr. 104–108).

8. Exception is taken to the statement that there is ambiguity and confusion in the designation or label used on some customers in relation to their functioning (Rec. Dec., p. 13). Respondent contends that there is no such ambiguity and confusion. (See references, Exception 4.)

9. Exception is taken to the statement that "while labeled 'wholesalers' they were doing an applicating business in the case of Brandin Slate, Hibernia and National" (Rec. Dec., p. 13). The evidence does not show that Brandin, Hibernia, or National were wholesalers or were labeled wholesalers during the period in question (Tr. 21, 110, 111, 112, 113, 114).

10. Exception is taken to the statement "You may call them (competing customers) any name you desire" (Rec. Dec., p. 13). Respondent contends that wholesalers should
135 be called wholesalers, that retailers should be called retailers, and that applicators should be called applicators.

11. Exception is taken to the statement that purchasers were designated as belonging to one class while functioning at times in such manner as to warrant another class desgination (Rec. Dec., pp. 13–14). Respondent contends that the evidence does not support this stat ent (Tr. 21–34, inc., 80, 85, 87, 94, 100, 104, 110, 111, 113, 139, 140, 141, 143, 154).

12. Exception is taken to the statement that National Roofing and Siding Company functioned as a wholesaler (Rec. Dec., p. 14). The testimony is clear that this company is a retailer and applicator (Tr. 110, 111, 112). The fact that there is also testimony that the company sold some small quantity of products to retailers (Tr. 111) at some time which is not disclosed by the evidence and for prices which are not disclosed by the evidence should not be considered as proof that the company operated as a wholesaler during the period covered by the complaint, particularly in the face of overwhelming direct testimony that it was a retailer and applicator (Tr. 22, 110, 111, 112).

13. Exception is taken to the statement that Crescent seems to have gotten discounts on the purchase price from respondent which Brandin Slate did not get (Rec. Dec., p. 14). Respondent contends that this is not supported by the testimony (Tr. 104–108).

14. Exception is taken to the statement that Mr. O'Leary classed Brandin Slate as a wholesaler whereas Brandin functioned
136 as an applicator (Rec. Dec., p. 14). Mr. O'Leary testified only that in 1946 Brandin Slate was classified as a wholesaler of asphalt products (Tr. 21).

15. Exception is taken to the statement that "the effect of such evidence as is shown regarding discrimination at the wholesale level, or purchasers who may have functioned temporarily as such, might have been further eroded away had respondent offered any rebuttal evidence showing such acts were inadvertent, in isolated cases only, and limited as to time, volume, and the area involved," and that "it offered no evidence in explanation or justi-

fication of such acts" (Rec. Dec., pp. 14–15). Respondent contends that this statement is unwarranted. The evidence did not show any discrimination at the wholesale level, and there was no occasion for the respondent to prove a negative.

16. Respondent excepts in its entirety to that part of the recommended decision which is entitled "D. Discrimination in sales to purchasers who functioned in two classes found" (Rec. Dec., pp. 15, 16). This part of the recommended decision is not factual but is argumentative. It ends by saying:

"The order should contain a provision restraining this evil through sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such."

This part of the recommended decision appears to advocate that an order be entered, the effect of which would be to restrain the respondent from violating the Robinson-Patman Act in any way.

The respondent contends that the order should be based on
137 the facts of the case. *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478, 483.

17. Exception is taken to the entire paragraph on page 16 beginning "It is therefore further found that there was price discrimination in sales by respondent to purchasers functioning in other than the one generally designated class" (Rec. Dec., 16). Respondent contends that this paragraph is not supported by the evidence (Tr. 21–34 inc. 80, 85, 87, 94, 100; 104, 110, 111, 113, 139, 140, 141, 143, 154).

18. Exception is taken to the statement that "Hearings for the receipt of evidence were held in various parts of the country" in Paragraph 3 of the recommended findings (Rec. Dec., p. 17). The only hearings for the receipt of evidence were held in New Orleans (Tr. 1–156).

19. Exception is taken to the second sentence of Paragraph 9 of the recommended findings to the effect that "evidence as to discrimination at the wholesale level is in conflict" and that "ambiguity arises from the function of the purchaser in relation to his designation as a class" (Rec. Dec., p. 20). Respondent contends that there is no evidence of discrimination at the wholesale level and that there is no such ambiguity. (See references, Exception 4.)

20. Exception is taken to the statements of the first three Subparagraphs of Paragraph B entitled "Comment of the Trial Examiner" (Rec. Dec., p. 20). Respondent contends that there is no confusion as to class designation (See references, Exception 4), that the evidence does not support the statement that National

Roofing functioned as a wholesaler (Tr. 110, 111, 112), or that Crescent enjoyed favored discounts over Brandin (Tr. 104–
138 108), or that Brandin was classified as a wholesaler during the period in question (Tr. 21, 138–141).

21. Respondent excepts to the last three paragraphs of the "Comment of the Trial Examiner" (Rec. Dec., p. 21). These paragraphs do not appear to be factual, but are argumentative, and the gist of the argument seems to be that an order should be entered broader than is warranted by any discrimination shown by the evidence.

22. Exception is taken to the whole of Subparagraph C entitled "Finding of discrimination in sales due to dual functioning by purchasers" (Rec. Dec., p. 22). Respondent contends that the evidence does not support a finding that discrimination existed in other than the class groups designated as retailers and applicators and that favored customers functioned in more than one trade group competitively (Tr. 21–34 inc. 80, 85, 87, 94, 100, 104–113 inc. 139, 140, 141, 143, 154). Respondent therefore objects to the order containing any provision "restraining this evil by preventing sales to any purchasers, however designated, as well as against retailers and applicators primarily functioning as such."

23. Respondent excepts to the inclusion of the proposed Paragraph 3 in the proposed order to cease and desist (Rec. Dec., p. 23). Respondent contends that the evidence does not show discrimination due to purchasers operating at more than one functional level, and that there is therefore no basis for the inclusion of the proposed Paragraph 3. (See references, Exception 22.)

24. Respondent excepts to the inclusion of the proposed
139 Paragraph 4 in the proposed order to cease and desist (Rec. Dec., p. 23). Respondent contends that such a paragraph would constitute a blanket injunction against violating the Robinson-Patman Act and is not supported by the evidence in the case. Milk and Ice Cream Can Institute v. Federal Trade Commission, 152 F. (2d) 478, 483.

25. Respondent excepts to the failure of the Trial Examiner to include in his proposed order to cease and desist the following paragraph submitted by counsel for the respondent.

"Provided, however, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered, and provided that nothing herein contained shall prevent respondent rebutting a prima facie case based upon discriminatory practices made subsequent to the

issuance of this order by showing that its lower price was made in good faith to meet an equally low price of a competitor."

Respectfully submitted.

SPENCER GORDON,
WILLIAM M. AIKEN,
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington 5, D. C.,
Attorneys for Respondent.

140 BEFORE FEDERAL TRADE COMMISSION

Commissioners: LOWELL B. MASON, Acting Chairman, WILLIAM A. AYRES, JOHN CARSON, JAMES M. MEAD.

[Title omitted.]

Order on exceptions to Trial Examiner's recommended decision

(January 20, 1950)

EXCEPTIONS FILED BY COUNSEL SUPPORTING COMPLAINT

In substance, all of the exceptions filed by counsel supporting the complaint are directed at the conclusion of the trial examiner that the record does not establish discriminations by respondent among wholesalers. The Commission is of the view that the trial examiner's conclusion in this respect is correct.

It is therefore ordered that said exceptions be, and they hereby are, denied.

EXCEPTIONS FILED BY COUNSEL FOR RESPONDENT

Exceptions 1, 2, 18. While these exceptions relate to minor matters in the recommended decision, the exceptions are factually correct.

141 It is therefore ordered that exceptions 1, 2, and 18 be, and they hereby are, sustained.

Exception 3. This exception is directed at the failure of the trial examiner to state that respondent sold asbestos and asphalt products in a different manner and with different discounts. In the opinion of the Commission this is a matter not material to the issue in the present proceeding and it was not error for the examiner to omit the statement.

It is therefore ordered that exception 3 be, and it hereby is, denied.

Exceptions 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 22. In substance, these exceptions relate to the trial examiner's statements

with respect to the proper classification of certain dealers (whether they are wholesalers, retailers, or applicators), with respect to dual functions performed by some of these dealers, and with respect to what the examiner regards as uncertainty or confusion existing in the record as to these points. The Commission is of the view that the trial examiner's statements are substantially correct.

It is therefore ordered that exceptions 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, and 22 be, and they hereby are, denied.

Exception 6. Exception is here taken to the trial examiner's statement that certain discounts were given to wholesalers, respondent's objection being that this statement did not also include retailers and applicators. The trial examiner was here dealing only with discounts to wholesalers and the omission of any reference at this point to other dealers is immaterial.

142 It is therefore ordered that exception 6 be, and it hereby is, denied.

Exception 7. Respondent here excepts to a statement by the trial examiner that Commission Exhibit 57 and certain testimony in connection therewith shows that certain specified discounts were given to Crescent Materials Service. It appears uncertain from the evidence as to just what discounts, percentagewise were allowed in this instance.

It is therefore ordered that exception 7 be, and it hereby is, sustained.

Exceptions 16, 21, 23, 24. These exceptions are directed at the recommendation of the trial examiner with respect to the order to cease and desist, the recommendation of the examiner being that the order should be sufficiently broad in scope to prohibit discriminations in price among competing purchasers of respondent's products, irrespective of the particular designations used to describe such purchasers and their functions. In the opinion of the Commission this recommendation is sound.

It is therefore ordered that exceptions 16, 21, 23, and 24 be, and they hereby are, denied.

Exception 25. Respondent here excepts to the failure of the trial examiner to include in his recommended order certain provisos submitted by respondent. These provisos in the opinion of the Commission are unnecessary to assure respondent its full legal rights and their omission by the trial examiner was proper

143 It is therefore ordered that exception 25 be, and it hereby is, denied.

By the Commission:

[SEAL]

D. C. Daniel,
D. C. DANIEL,
Secretary.

BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

Findings as to the facts and conclusion

January 20, 1950

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman
144 Act, approved June 19, 1936 (15 U. S. C., Sec. 13) The Federal Trade Commission on July 26, 1943, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with violation of subsection (a) of section 2 of that Act as amended. After the filing by respondent of its answer to the complaint and after certain evidence in support of the complaint had been introduced before a trial examiner of the Commission theretofore duly designated by it, counsel supporting the complaint and counsel for respondent agreed that the matter might be determined upon the evidence introduced up to that time, without the necessity of further evidence. Thereafter, the proceeding regularly came on for final consideration by the Commission upon the complaint, answer, evidence, recommended decision of the trial examiner, the briefs of counsel, and oral argument; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

Paragraph One. The respondent, The Ruberoid Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, New York. Respondent is now and since June 19, 1936, has been engaged in the business of processing, manufacturing, offering for sale, selling, and distributing asbestos and asphalt roofing, insulating materials, and allied products.

Respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating ma-
145 terials and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Maryland; Mobile, Alabama; Erie, Pennsylvania;

Millis, Massachusetts; and Chicago, Illinois. Respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicator" herein used applies to purchasers known as building or roofing contractors, who apply to buildings the products purchased from respondent. The applicator usually sells respondent's products to consumers on a contract basis, charging the consumer for the material used and the labor employed in connection with the applying of the products to buildings.

Paragraph Two. Respondent sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia, and preliminary to or as the result of such sales causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various States of the United States and in the District of Columbia. There is, and at all times mentioned herein has been, a continuous current of trade and commerce in such products across State lines between respondent's plants, factories, or warehouses and the purchasers of such products. The products are then sold and distributed for use and resale within the various States of the United States and the District of Columbia.

Paragraph Three. In the course and conduct of its business, respondent has been and is in substantial competition with other manufacturers and sellers of similar products who have been and are engaged in the sale of such products in commerce between and among the various States of the United States.

146 Many of respondent's customers are competitively engaged with one another and with the customers of respondent's competitors in the resale of asbestos and asphalt roofing, insulating materials, and allied products within the several trade areas in which respondent's customers respectively offer for sale and sell the products purchased from respondent.

Paragraph Four. In the sale of its products in commerce, as aforesaid, respondent has discriminated in price by selling its products to some of its customers at prices lower than those at which it sells products of like grade and quality to other customers who compete with such favored customers in the resale of such products. Among the specific instances of discrimination disclosed by the record are the following, all of the purchasers involved being located in the New Orleans, Louisiana, trade area:

On March 12, 1941, respondent sold A. H. White Roofing Company 17 squares of jade green, 16-inch hexagonal asbestos roofing shingles at $6.72 per square, and granted a 6% discount on this item. On March 13, 1941, respondent sold National Roofing Company 25 squares of the same type of shingles as it sold A. H. White

Company at $6.72 per square, and granted it a 6% discount and a further discount of 5%.

On March 17, 1941, respondent sold A. H. White Roofing Company 15 rolls of 30-pound asphalt felt at $1.50 a roll, and granted a 6% discount on this item. On the same date respondent sold F. J. Villars & Son 100 rolls of the same type of asphalt felt as it sold the A. H. White Company at $1.50 a roll, and granted it a 6% discount and a further discount of 5%.

147 On February 8, 1941, respondent sold Jordy Brothers 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Company 15 squares of the same type of shingle at $6.52 per square, and granted a 6% discount on this item. On February 7, 1941, respondent sold Brandin Slate Company 10 squares of the same type of shingle that it sold Jordy Brothers and the A. H. White Company at $6.52 per square, and granted to this purchaser both a 6% and a 5% discount.

On September 29, 1941, respondent sold A. H. White Roofing Company 50 rolls of 15-pound asphalt felt at $1.66 per roll. On the same date it sold the National Roofing Company 50 rolls of the same type of felt at $1.66 per roll, and granted a 5% discount.

On June 30, 1941, respondent sold Joseph Modenbach & Sons 30 rolls of 30-pound asphalt felt at $1.50 a roll. On June 24, 1941, respondent sold National Roofing Company 75 rolls of this same type of asphalt felt at $1.50 a roll, and granted a 5% discount.

On August 4, 1941, respondent sold Joseph Modenbach & Sons 25 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at $6.52 per square and 30 rolls of 30-pound asphalt felt at $1.58 per roll, and granted a 6% discount on the shingles. On August 23, 1941, respondent sold F. J. Villars & Son 22 squares of the same type of shingles at $6.52 per square and 65 rolls of the same type of asphalt felt at $1.58 per roll and granted a 6% discount and a further discount of 5% on the shingles and a 5% discount on the asphalt felt.

148 On April 22, 1941, respondent sold A. H. White Roofing Company 50 squares of Snow White, 12-inch asbestos colonial siding at $5.88 per square, and granted a 6% discount. On the same date it sold the National Roofing Company 3 squares of the same type of siding at $5.88 per square, and granted both a 6% discount and a 5% discount.

On May 13, 1941, respondent sold A. H. White Roofing Company 25 squares of Snow White, 12-inch asbestos colonial siding at $5.88 per square, and granted a 6% discount. On the same date it sold Brandin Slate Company 14 squares of the same type of siding at $5.88 per square, and granted both a 6% discount and a 5% discount.

The respective purchasers of respondent's products referred to above were competing in the resale of these products as roofing contractors or applicators and as retailers. The competition among these customers of respondent was keen. Respondent recognized that a different of 2½% was material to its customers in the possible diversion of trade. In fact, a difference of a dollar or more in the price of a roofing job as between equally reputable applicators could be decisive in securing the business for the applicator offering the lower price. In these circumstances customers receiving preferential discounts had a material competitive advantage over customers to whom such discounts were denied.

There is no contention on the part of respondent that the preferential discounts were justified by lower costs.

Paragraph Five. There is sharp disagreement between counsel as to whether the record establishes discriminations by respondent among wholesalers. In the opinion of the Commission,
149 the trial examiner is correct in his conclusion that there is insufficient evidence to establish such discriminations. However, as the trial examiner points out, there is some confusion on this point due to the fact that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator.

The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers.

Paragraph Six. The effect of the discriminations in price referred to herein may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between the purchasers receiving the benefit of such discriminatory prices and those from whom such prices are withheld.

150 CONCLUSION

The discriminations in price by respondent as herein found are violative of subsection (a) of section 2 of the aforesaid Clayton Act, as amended.

By the Commission:

[SEAL]

Lowell B. Mason,
LOWELL B. MASON,
Acting Chairman.

Attest:
D. C. Daniel,
D. C. DANIEL,
Secretary.

151 (January 20, 1950).

BEFORE FEDERAL TRADE COMMISSION

[Title omitted.]

Order to cease and desist

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner, briefs filed by counsel supporting the complaint and counsel for respondent, and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. Sec. 13):

It is ordered that the respondent, The Ruberoid Company, a corporation, and its officers, representatives, agents, and em-
152 ployees, directly or through any corporate or other device, in connection with the sale of asbestos or asphalt roofing materials in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price:

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who

in fact compete with the favored purchaser in the resale or distribution of such products."

It is further ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission:

[SEAL] D. C. Daniel,
D. C. DANIEL,
Secretary.

152c In the United States Court of Appeals

[Title omitted.]

Petition to review and set aside an order of the Federal Trade Commission

April 25, 1950

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

Your petitioner, The Ruberoid Co., by Cyrus Austin its attorney, hereby petitions this Court to review and set aside a certain order of the Federal Trade Commission hereinafter more fully described, and respectfully shows to the Court:

I. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, in the City and State of New York.

II. On July 26, 1943, the Federal Trade Commission commenced a proceeding against petitioner pursuant to the provisions of Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. A., sec. 21), by the issuance of a complaint charging petitioner with having discriminated in price between competing purchasers of its asphalt and asbestos roofing materials in violation of
152d Section 2 (a) of said Act (49 Stat. 1526, 15 U. S. C. A., sec. 13). The said proceeding was entitled "In the Matter of The Ruberoid Company, a corporation" (F. T. C. Docket No. 5017).

III. Petitioner duly filed its answer to said complaint, admitting that it was engaged in the sale and distribution of asphalt and asbestos roofing materials (and other products) in interstate commerce, but denying that it had discriminated in price as al-

leged and denying that the effect of such discriminations, if any, had been or might be substantially to lessen competition or to injure, destroy or prevent competition with the purchasers receiving the benefit thereof.

IV. Thereafter hearings were held before Charles B. Bayly, a trial examiner duly appointed by the Commission, and testimony and other evidence was received in support of said complaint and in opposition thereto. Upon the conclusion of said hearings, the trial examiner made and filed his "Recommended Decision," including a report upon the evidence, recommended findings, and order. Exceptions thereto and briefs were filed with the Commission by petitioner and by the Commission's attorney, and the proceeding duly came on for oral argument and initial decision by and before the Commission upon the record, recommended decision of the trial examiner, exceptions and briefs.

V. On January 20, 1950, the Commission issued in said proceedings its "Findings as to the Facts and Conclusion" together with its "Order to Cease and Desist," which said order directs your petitioner, in connection with the sale of asbestos or asphalt roofing materials in interstate commerce, to cease and desist from discriminating in price

"By selling such products of like grade and quality to any
152e purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

VI. This petition is filed, and the jurisdiction of this Court is invoked, pursuant to Section 11 of the Clayton Act. Petitioner carries on business within the Second Circuit.

VII. The relief hereby prayed is that the said order of the Commission be set aside, or in the alternative that the same be modified in the following respects:

(1) By limiting the prohibitions of said order to discrimination in price between purchasers of petitioner's said roofing materials competing in the resale thereof at retail, or in applied form as roofing contractors or applicators.

(2) By limiting the application of the order (by proviso or otherwise) to differentials which were found by the Commission upon the evidence to have a tendency substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such differentials are engaged, or to injure, destroy or prevent competition with purchasers receiving the benefit of such differentials.

(3) By the addition of a proviso to the effect that the order shall not be construed as prohibiting differentials which make only due allowance for differences in the cost of manufacture,

sale or delivery resulting from the differing methods or quantities in which such materials are to such purchasers sold or delivered.

152f (4) By the addition of a proviso to the effect that the order shall not be construed as prohibiting petitioner from making a lower price to any purchaser of its said materials in good faith to meet the equally low price of a competitor.

VIII. The points upon which petitioner intends to rely are:

(a) The Commission has expressly found that the discriminations in price proved, and upon which its findings are based, were discriminations in price between purchasers "competing in the resale of these products as roofing contractors or applicators and as retailers." The Commission has expressly found that the record contains no substantial evidence establishing discriminations by petitioner between wholesalers. The order, on the other hand, prohibits any price differential between purchasers of any class competing in the resale or distribution of the said roofing materials, including wholesalers and manufacturers. There is no evidence that the effect of any difference, however small, in the prices charged competing wholesalers, jobbers, manufacturers and others to whom petitioner may sell its said products for resale (other than retailers and applicators) may be to affect competition in any of the respects prohibited by Section 2 (a) of the Clayton Act. There is no evidence that a price differential of less than 2½% between competing retailers of such products may have any of the said effects on competition.

(b) The order is invalid and unlawful in that it prohibits price differentials between competing manufacturers, jobbers,

152g wholesalers and others which are not unlawful per se and as to which there is no evidence sufficient to support an inference, and no finding, that they may have any prohibited effect on competition or tend to create a monopoly. The issuance of an order prohibiting such differentials without proof thereof, and without any basis in the record for concluding that they would be unlawful if granted, is unauthorized and amounts to a denial of due process.

(c) The order prohibits any price differential between purchasers competing in the resale of petitioner's said products, including retailers and applicators, without regard for the fact that such a differential is not unlawful if it makes only due allowance for differences in petitioner's costs as provided by the first proviso of Section 2 (a) of the Clayton Act. The granting of a quantity discount or other differential which could be so justified would violate this order. Without a proviso or other limitation

excepting such lawful differentials from its scope, the order is unduly restrictive and invalid.

(d) The proviso of Section 2 (b) of the Clayton Act permits a seller charged with violation of Section 2 (a) to show in rebuttal that his lower price was made in good faith to meet the equally low price of a competitor. Petitioner has had no opportunity to make such a showing except as to the differentials specifically proved herein, and under the terms of this order would not have such an opportunity with respect to any differentials alleged to have been granted in violation thereof. The order should be modified so as to exclude from its prohibitions differentials made in good faith to meet competition.

152h Wherefore, petitioner prays that the said cease and desist order of the Federal Trade Commission be set aside, or, if the Court be of the opinion that said order should not be wholly set aside, then that the same be modified as set forth in Paragraph VII of this petition or in such other manner and to such other extent as to the Court may seem just and proper.

CYRUS AUSTIN,
Attorney for Petitioner.

Dated New York, N. Y., April 25, 1950.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950.

(Argued April 4, 1951. Decided June 4, 1951.)

Docket No. 21667

THE RUBEROID CO., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Before:

L. HAND, AUGUSTUS N. HAND *and* CLARK, *Circuit Judges.*

Petition by The Ruberoid Co. to review and set aside an order of the Federal Trade Commission. Order affirmed and enforcement granted.

CYRUS AUSTIN, of New York City (Austin & Malkan, of New York City, on the brief), *for petitioner.*

JNO. W. CARTER, JR., *Atty.*, Federal Trade Commission, of of Washington, D. C. (W. T. Kelley, General Counsel, and James W. Cassedy, Asst. Gen. Counsel, Federal Trade Commission, of Washington, D. C., on the brief), *for respondent.*

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CLARK, *Circuit Judge:*

On a proceeding to review an order of the Federal Trade Commission, petitioner Ruberoid Co. prays that the order be set aside, or in the alternative modified in some four respects. The order was issued upon a complaint charging petitioner with violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. §13(a). It directed petitioner to cease and desist from price discrimination in the sale of asbestos or asphalt roofing materials "by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

The order was issued after hearings, wherein counsel for the Commission produced evidence showing that petitioner had granted discounts or price differentials of from 5% to 7½% of list price to certain of its customers. Petitioner classified its customers into three groups: wholesalers, retailers, and applicators, the last being roofing contractors who applied petitioner's products on their contract jobs for which they were paid as a whole. The Commission found active competition for the resale of petitioner's products, as well as the price discrimination noted, among the roofing contractors or applicators and the retailers. As to wholesalers, there was sharp disagreement among counsel as to whether the record established any discrimination there. The Commission noted this, and went on to hold the evidence insufficient to establish such discrimination, but pointed out "that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator." In a conclusion challenged here, it then said that the particular designations applied to the various purchasers were unimportant, the controlling factor being the establishing of price discriminations among purchasers who were in fact competing with one another in the resale of petitioner's products. So, it concluded: The corrective action "should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers."

At the hearings petitioner presented no evidence contesting the price discrimination found by the Commission and does not seriously contest the issuance of some form of order against it. It does, however, vigorously attack the order for its generality and for the particular prohibitions discussed below. We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks. Compare *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, 249, 253. In formulating its orders, the Commission has tried from time to time to develop a plan; but one of its latest attempts, that in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, resulted in such failure that it is now attempting a new course, which "merely represents another milestone" in its efforts to establish a fair and just interpretation of this difficult Act. We are not justified in ordering the Commission to undertake an illusory certainty which will not stand up in the process of review.

Petitioner's requested modifications are that the order be reframed to prohibit only differentials between purchasers of roofing materials competing in the resale thereof as applicators or retailers; to exempt differentials of less than 2½% between retailers; to contain a proviso excepting a discount for differences in petitioner's costs of manufacture, sale, or delivery, *i.e.*, a quantity or other discount permitted under the Act itself; and to contain a proviso excluding from its prohibition differentials made in good faith to meet competition, again as permitted in the Act itself. The first two provisions, petitioner claims, are required by the evidence. The last two, involving exceptions in the Act itself, it claims to be necessary lest it either be held in contempt for lawful acts or bear the burden of showing legality.

Parenthetically we should point out that under the *Morton Salt* case, explicitly following our own decision in *Samuel H. Moss, Inc.* v. *F. T. C.*, 2 Cir., 148 F. 2d 378, *certiorari* denied 326 U. S. 734, the burden of proving that a seller comes within one of the Act's exceptions is placed upon the one who claims it. Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discriminations and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled.

The other two requested modifications are apparently the main reasons for plaintiff's appeal to us. Since discrimination among wholesalers was not found, the argument is that the prohibition should run against only differentials among applicators or retailers. Since no differentials under 5 per cent were found, the argument is that there is no evidence to support a finding of material discrimination in lesser differentials—specifically, those up to 2½ per cent among retailers. The first point rests upon the provision of the Act which prohibits discrimination "in price between different purchasers of commodities of like grade and quality" and previous decisions of the Commission drawing distinctions in price discrimination based upon functional differences among classes of competing purchasers. Thus the order in the *Morton Salt* case,

which appears at page 51 of 334 U. S., separately prohibits price discrimination among wholesalers and price discrimination among retailers. That fact, however, was not of importance in the decision and nothing therein states any arbitrary requirement to that effect. Here, too, the Commission's answer appears adequate, as is demonstrated by its findings and conclusions with respect to the applicators. Indeed to many of us an "applicator" who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a wholesaler; moreover, as the Commission pointed out, there was no rigid differentiation of function: one applicator, for instance, sold quantities of the products to other applicators, while one wholesaler acted as an applicator. The Commission appears quite justified, therefore, in concluding that there was no real functional difference necessarily disclosed by petitioner's classification of its customers and that the order should hit the evil directly, rather than invite evasion by incorporating an ambiguous label. Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 51, 52 (1950).

As to the request for the modification permitting a 2½ percent differential, there seem two definite answers: First, there is nothing in the law suggesting such a limited differential; even assuming *arguendo* that the Commission perhaps might permit it on a finding of immateriality under all the circumstances, we cannot force such a finding upon it. Second, there was evidence tending to show that differentials of small amounts were important in the trade. As to the first, petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35. Proof of the violation here made should lose nothing, it would seem, because it is thorough proof of a thorough violation. Prohibition should cover in any event the violation in full.

Petitioner claims some support from the *Morton Salt* case, but we think that decision is quite definitely against the contention made. In that case the Commission expressly prohibited selling "to some wholesalers [or retailers as covered by a separate paragraph] thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers [retailers.]" The Court specifically says, 334 U. S. at page 53: "Paragraphs (a) and (b) up to the language of the provisos are approved," a statement it repeats later, 334 U. S. at page 55. It goes on to point out that the clause permitting differentials of less than five cents "would appear to benefit respondent, and no

challenge to it, standing alone, is here raised." Then it considers the respondent's objection to the final clause and holds that clause invalid for a vagueness which throws the whole question into the courts. It strikes this latter part out, but, while saying that it would sustain the order with the exception of the proviso, nevertheless concludes that the deleted part is so important that the Commission "should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary."

Thus it is quite clear that an order may legally prohibit *all* differentials, and hence the form of prohibition before us is justified by the *Morton Salt* case itself. It is to be noted that the Court does not in that case expressly approve of the small differential of five cents per case there suggested by the Commission, although it is a possible inference, in view of the purpose for which the matter was returned to the Commission, that a finding in favor of such a differential would not be illegal if based on appropriate evidence. It is clear, however, that the case does not force the Commission always to indicate some modest maximum in stating its prohibition.

Moreover, here the evidence produced by the Commission through the testimony of a sales manager for the petitioner showed that differentials of small amount and specifically of 2½ per cent were quite important in the realm of competition among petitioner's customer. The manager testified that in certain instances the 5 per cent discount allowed was insufficient for the customers' uses and petitioner found it therefore necessary or desirable to add an additional 2½ per cent. *Cf. Austin, op. cit. supra* at 48, 49. In the light of this evidence and in view of the very wide discretion given the Commission in fitting the remedy to the evil before it, *Jacob Siegel Co.* v. *F. T. C.*, 327 U. S. 608, 611, 612; *Charles of the Ritz Distributors Corp.* v. *F. T. C.*, 2 Cir., 143 F. 2d 676, 680, we are not justified in ordering the insertion of a maximum permissible discrimination, even a moderate one, in this order. It must therefore stand, for appropriate enforcement.

Order affirmed; enforcement granted.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950

THE RUBEROID CO., *Petitioner,*

against

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Rehearing.

GROUNDS OF PETITION.

The Ruberoid Co., respondent before the Commission, petitioned this court, pursuant to Section 11 of the Clayton Act, to review and set aside or modify a cease and desist order of the Commission. The court has affirmed the order. At the end of its opinion, and we believe without due consideration, the court has added the words "enforcement granted". This petition for rehearing is directed solely to the question of enforcement.

The Commission is not entitled to a decree of enforcement as a matter of right or of course, upon affirmance of its order. The Act does not authorize it to apply for enforcement except upon a showing that the respondent has not complied with the order after issuance. Here there is no charge or showing of violation, and no application or cross petition for enforcement was filed.* While a formal application may not be essential, this court and other Courts of Appeals have repeatedly held that a decree directing compliance will not issue except upon a showing of violation of the order or threat of violation, applying the same principles followed by courts of equity in injunction suits generally. This case is peculiarly one calling for the application of those principles; and it is submitted that, in conformity therewith, an injunction should here be denied.

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* At the end of its brief the Commission prayed that "pursuant to the statute" the court enter a decree commanding compliance with the order, erroneously citing a provision of the Federal Trade Commission Act. That Act, of course, has no application whatever here. We regarded this as a mere inadvertence or "slip of the tongue" on the part of Commission's counsel, presenting no question under the Clayton Act.

ARGUMENT AND AUTHORITIES.

Review and enforcement of cease and desist orders of the Commission in Clayton Act cases is governed by Section 11 of that Act, which provides:

> "If such person fails or neglects to obey such order of the commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States * * * for the enforcement of its order, * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order * * *.
>
> "Any party required by such order of the commission * * * to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order * * * as in the case of an application by the commission * * * for the enforcement of its order, * * *.

The scheme of the Act seems clear. If the order is violated, whether or not its validity is challenged, the Commission may apply to the court for enforcement. On the other hand, a respondent who desires in good faith to comply with the Commission's directive, but questions its validity or scope, may petition for review on that issue alone without subjecting itself to a court injunction. In either case the court obtains jurisdiction of the proceeding and is empowered to affirm, set aside or modify the order, but the question of enforcement does not arise unless a violation or threat of violation appears.

The question of affirmance or setting aside, and the question of enforcement, are therefore separate and distinct. The one depends upon whether the practices prohibited were in violation of the statute, or perhaps, as in this case, only upon the scope and terms of the order. The other depends upon evidence of violation or threat of violation of the order after issuance, sufficient to justify the granting of an injunction by a court of equity. Indeed, the Commission has no need or occasion to seek an injunction so long as its order is complied with, and that is equally true whether the respondent does or does not exercise its right to have a review of the order's validity.

The considerations affecting both questions are the same regardless of which party brings the case to the court, and the courts have made no distinction. It would be inconsistent to hold that if the

Commission petitions for enforcement the court will limit itself to the question of affirmance unless violation is proved, but that if the respondent brings the case up an injunction will follow affirmance as a matter of course. Such a rule would penalize the respondent for petitioning for review. It would mean that a respondent could test an order of doubtful validity only at the risk of having to do business thereafter under a court injunction; and the risk would be a certainty where, as here, only modification was sought. It would place a premium on violation rather than review, and would add to the enforcement burden of both the Commission and the courts.

Prior to amendment in 1938 the review and enforcement provisions of Section 5 of the Federal Trade Commission Act were identical with those of Section 11 of the Clayton Act. In *Federal Trade Comm.* v. *Standard Education Society*, 14 F. 2d 947 (1926) upon a petition by the Commission for enforcement, the Seventh Circuit construed the said provisions as follows:

> "If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory.
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> * * *
>
> "Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. It was the apparent intention of the Congress to give the practicer of the alleged unfair methods an opportunity to mend its ways before subjecting it to a decree of court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed."

The court refused enforcement, directing a stipulation of facts or reference on the question of violation. Thereafter the proceeding was dismissed on motion of the Commission upon assurance by the respondent that it would comply with the order.

The precise question now presented came before the Court of Appeals for the Sixth Circuit in *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752 (1923). A petition for review was there filed by the respondent company. The court affirmed the order with modifications; and the Commission moved for recall of the mandate and for entry of a decree of enforcement. The court stated:

"We directed a modification of the Commission's order in certain respects, and in other respects affirmed it. The Commission now asks that this mandate be recalled, and that this Court enter its decree enjoining the Silver Company from further continuing those practices as to which we had affirmed the Commission's order. The ground of this application is that there must be an order of this court before there can be any enforcement of the Commission's order through punishment for violation; that if the application in this matter had been by the Commission for enforcement, instead of by the Silver Company for vacation, the court would have entered such an injunction order; and that, to avoid unnecessary forms and proceedings, such an order should likewise be entered when a petition for vacation is denied. * * *

"We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.

"It is the general practice in such cases that if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, * * *. The situation, then, is that, as to the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

This court several times has had occasion to consider the question of enforcement of Federal Trade Commission orders and has

stated the principles to be applied before granting such injunctive relief. *Butterick Co.* v. *Federal Trade Comm.*, 4 F. 2d 910 (1925), was a proceeding upon petition for review filed by the respondent before the Commission. The Commission filed a cross-petition for a decree of enforcement commanding petitioner to cease and desist from the practices forbidden. It appeared that petitioner was continuing to do business under contracts held by the Commission and by the court to violate the Clayton Act. The court therefore granted enforcement, but stated that it would not have done so if the violations had theretofore ceased and there were no threat of renewal. It was stated (p. 913):

> "The jurisdiction of the court in this proceeding is original rather than appellate, and, since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. Silver Co. v. Federal Trade Commission (C. C. A.) 292 F. 752. The decree should be along the lines adopted by the courts of equity in hearing suits of injunction. It is the general practice in such cases that, if the defendant is continuing or threatening acts, there will be an injunction, but, if whatever was unlawful ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice."

In *Federal Trade Comm.* v. *Balme*, 23 F. 2d 615 (1928), cert. den. 277 U. S. 598, upon a petition for enforcement, this court pointed out that the statutory jurisdiction conferred must be strictly pursued, and stated (p. 618):

> "Manifestly, it is very apparent that the question of violation of the commission's order would not be involved until a valid order was recognized by this court after having acquired jurisdiction. Therefore we must first examine the proceeding before the commission and determine whether there has been a violation of the law."

The court thereupon affirmed the order and referred the question of "the present violation of section 5" to the Commission for determination and report. The Commission thereafter held hearings and reported back to the court that the evidence did not then show a violation of the order. The court thereupon, on January 16, 1928, entered its order denying the Commission's prayer for a decree of enforcement.

And in *Federal Trade Comm.* v. *Herzog*, 150 F. 2d 450, 452 (1945) this court stated:

> "The Commission asks us to enter a decree commanding obedience to its order without regard to whether the respondents have violated it".

After citing the Balme and Standard Education Society cases (*supra*), the court continued:

> "We are asked to reconsider these decisions, but we see no reason to do so; no contrary decision has been cited. * * * In the case at bar the violations of the Clayton Act which the Commission found occurred nearly five years ago; * * *."

In the present case the price discriminations which the Commission found unlawful occurred ten years ago, in 1941. They resulted from certain discounts allowed locally for a short time to certain dealers in New Orleans, La. to meet competitive conditions then existing. The case was not tried until 1946, and it appears from the record that the discriminations had then ceased. There was no evidence of violations before or after 1941. The order herein was not issued until 1950. It might well be questioned whether the Commission was justified in holding hearings and issuing an order in a case so stale.

Furthermore, petitioner did not come before this court asserting the right to continue or renew the discriminations found unlawful by the Commission. The order was challenged only to the extent that, in terms, it prohibits what was not found unlawful and what the statute permits. We submit that application of the principles stated in the above-cited decisions points clearly to a denial of an injunction in this case.

An order of affirmance is not equivalent to a decree of enforcement. The Seventh Circuit so held in *Federal Trade Comm.* v. *Fairyfoot Products Co.*, 94 F. 2d 844 (1938). There the Fairyfoot company had petitioned for review of an order of the Commission, and the court had affirmed. Thereafter the Commission petitioned for a rule to show cause why Fairyfoot should not be adjudged in contempt for violating the order of affirmance. While recognizing its "wide discretion" to dispose of the questions of affirmance and enforcement in one proceeding, the court nevertheless held that contempt would not lie and dismissed the petition, stating:

> "Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41 et seq., the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the 'cease and desist order' has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. But it does not follow that the unlawful act of disobedience can be made the

basis of a contempt proceeding in this court, even though the order of affirmance of this court, in a sense, gives legal validity to the order of the Federal Trade Commission. For the lawfulness of the order of the Commission derives ultimately from the act of Congress and not from this court's adjudication of its lawfulness.

"Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.'

* * *

"'Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question.'"

The Clayton Act and the Federal Trade Commission Act were enacted in 1914, the provisions for review and enforcement of cease and desist orders of the Commission being the same in each. In 1938 Congress amended Section 5 of the Federal Trade Commission Act, striking out the provision for enforcement upon application of the Commission, making the Commission's orders final unless the respondent petitions for review within 60 days, and prescribing penalties for violation. A clause was also added directing the Court of Appeals to issue a decree of enforcement in the event of affirmance upon review. The original provisions of Section 11 of the Clayton Act have not been changed. If the Commission feels that the procedure provided by the latter Act is too lenient or unduly cumbersome, then, as stated by the court in *Federal Trade Comm.* v. *Standard Education Society, supra,* its complaint should be addressed to Congress and not to this court.

Petitioner has complied with this order as interpreted by the court and desires to do so. It came to this court for assurance that the order will not be applied or construed to prohibit what the statute permits; and that assurance the court has given. No ground or need has been shown for the issuance of an injunction. Petitioner therefore prays that its petition for rehearing be granted, that the opinion herein be modified by striking therefrom the words "en-

forcement granted", and that the order or decree to be entered thereon be limited to affirmance of the order of the Commission.

Respectfully submitted,

AUSTIN & MALKAN,
Attorneys for Petitioner.

CYRUS AUSTIN,
Of Counsel.

United States Court of Appeals
Second Circuit
Filed Jul 6, 1951
A. M. BELL, *Clerk.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950

No. 21667

THE RUBEROID CO., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Answer to Petition for Rehearing.

Now comes the Federal Trade Commission, respondent in the above-captioned matter, and in answer to the petition for rehearing, answering says:

PRELIMINARY STATEMENT.

The petition for rehearing here is as devoid of substance and merit as was the petition to review and set aside or modify the

order to cease and desist, which invoked the jurisdiction of this court and resulted in the decision of June 4, 1951, affirming and enforcing the Commission's order.

In considering the petition for rehearing the court should keep in mind that petitions in this court to review and set aside Commission orders, at the instance of respondents before the Commission, stand upon entirely separate and distinct statutory provisions from the statutory provisions relating to applications for enforcement, at the instance of the Commission. This is a most important distinction and difference and one that petitioner has very carefully, studiously and skillfully ignored in its petition for rehearing.

Just as the petition for review filed by petitioner in this matter was based upon a misconception of the facts and the law, the petition for rehearing here is based upon (1) a misconception of the facts found by the Commission and affirmed by this court, and (2) a misconception of the applicable law and court decisions.

(1) *There is no evidence in the record establishing the fact, nor is there any logical or normal inference flowing from the facts established by the record, that petitioner has discontinued or has any intention of discontinuing its unlawful method of selling its products.*

In the paragraph on page 8 of the petition for rehearing, beginning with the words "In this respect * * *" petitioner attempts to give this court a factual basis to justify granting its prayer for rehearing and modifying the opinion of this court by striking therefrom the words "enforcement granted". Petitioner tells the court that the unlawful price discriminations occurred 10 years ago, resulted from certain discounts allowed locally for a short period of time in New Orleans to meet competitive conditions; that "it appears from the record that the discriminations had then ceased" and that "there was no evidence of violation, before or after 1941". This statement by petitioner is wholly inaccurate and can find no basis for support either in the record or in the Commission's finding as to the fact which this court has affirmed and which petitioner does not here question.

The Commission found that in the sale of its products petitioner engaged in unlawful price discriminations. This finding was neither restricted to time nor to locality. It is true, as it of necessity must be, that the examples of actual sales made showing this unlawful discrimination were limited as to time and locality. Such sales

were illustrative of petitioner's course of conduct in selling its products throughout the country. There is no evidence in the record that petitioner's sales method, as found by the Commission, was different in different localities; there is undisputed evidence in the record that from 1936 down to and including the year 1946 (the time of the hearing) petitioner's method of selling was as found by the Commission. There is not one scintilla of evidence establishing any local competitive condition which caused petitioner to sell to some customers at a lower price than to others. On the contrary, the record establishes the fact that the competitive conditions mentioned were a "surmise" on petitioner's part and could not be established by proof. There is no evidence of any nature in the record that petitioner, during the hearings before the Commission, had discontinued its unlawful conduct or even intended to discontinue such conduct. As a matter of fact, the evidence in the record establishes the fact that petitioner at the time of the hearing was selling its products of like grade and quality to some customers at a lower price than to other customers.

Since petitioner elected not to introduce any evidence showing that its price discriminations were justified by cost or were made in good faith to meet competition; or evidence that such price discriminations were restricted as to area and as to time and not a pattern of its sales plan throughout the country; or evidence that it had discontinued such practices, then the facts established by the Commission in this record and the logical inferences flowing therefrom which formed a basis for the Commission's finding as to the fact, which this court affirmed, stands. The record is that petitioner is engaged in unlawful price discriminations in the sale and distribution of its products; that the record is devoid of evidence that petitioner has discontinued this method of sale; and, implicit in petitioner filing its petition to review asking this court to set aside the order, on the ground that it was illegal or, in the alternative, asking this court to so modify the order as to destroy its effectiveness, petitioner asserted its right to continue its method of selling its products. A method which this court found to be unlawful. This record as thus established can not now be changed by the *ipsi dixit* of petitioner's attorney.

Further than this, it is more than significant that at no time, neither in petitioner's brief, nor in its reply brief, nor in its oral argument before this court, nor in the petition for rehearing—does petitioner state in plain simple language that it has discontinued its unlawful conduct. We therefore submit that there is no factual basis established by this record here that would justify this court granting the petition for rehearing and modifying its opinion hand-

ed down on June 4, 1951, by striking therefrom the phrase "enforcement granted".

(2) *The concluding paragraph of the Commission's brief praying that the petition for review be dismissed and that the court affirm and enforce the order is properly before this court in the nature of a cross petition.*

It has long been the practice of the Commission, where a petition for review has been filed, to include in the concluding paragraph of its briefs a prayer asking the court to dismiss the petition to review and enter a decree affirming and enforcing the Commission's order. This procedure has met with the approval of the courts. The concluding paragraph of the Commission's brief in the instant matter followed this practice. Petitioner raised no question as to this either in its reply brief or in its oral argument before this court. In its petition for rehearing (pp. 1-2) petitioner raises the question for the first time, contending that there was no cross petition for enforcement filed by the Commission and that the concluding paragraph of the Commission's brief "erroneously cited a provision of the Federal Trade Commission Act" presents no question under the Clayton Act. Even though conceding that a formal application in proceedings of this nature is not essential, it would appear that petitioner is here objecting to this court considering the concluding paragraph of the Commission's brief as a cross petition praying for enforcement.

It may be that the citation here referred to is not applicable in the instant matter, however, the Commission's authority for such citation can be found in the decision of the Third Circuit, *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 67 (1939). This case was before the court upon petition to review and set aside the Commission's order. It involved a violation of the Clayton Act, as amended, and came before the court upon petition to review and set aside the Commission's order. The court affirmed and enforced the Commission's order in the following language:

> "A decree will be entered affirming the Commission's order and commanding the petitioner to obey it. See 15 U.S.C. 45, as amended."

Even though the citation may not be applicable, this would not vitiate the Commission's prayer for relief.

In *Electro-Thermo Co.* v. *Federal Trade Commission*, 91 F. 2d 477 (C.A. 9, 1937) a case arising upon petition to review an order of the Federal Trade Commission, the Commission did not file a separate pleading seeking enforcement of its order but merely prayed in the concluding paragraph of its brief (as in the instant

matter) that the petition to review be denied and the order affirmed and enforced. The court affirmed the Commission's order and a decree of enforcement was granted. In referring to the prayer in the Commission's brief, the court, speaking through Judge Denman, at pages 480-481, said:

> "In its brief (and not otherwise) the Commission asks for a decree of affirmance and enforcement of its cease and desist order. Petitioner moved to strike the 'cross-petition' because it is not properly before us. Petitioner alleges that before a decree of enforcement can be granted it must appear that the recipient of the cease and desist order has disregarded it."

After quoting the Act, the court, at page 481, said:

> "It would seem, in view of the statute, that the Commission's informal prayer for affirmance of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other."

The Commission therefore submits that the prayer for affirmance and enforcement in the concluding paragraph of the Commission's brief in the nature of a cross-petition is properly before this court.

(3) *Where, under a petition to review and set aside the Commission's order, the court dismisses the petition and affirms the order, the Act does not require the Commission to prove a violation thereof before it is entitled to a decree of enforcement.*

A proceeding before the circuit court of appeals in cases of this kind is of an equitable nature[1] and the power granted the court over such orders is intended to be exercised somewhat as the courts review injunction proceedings.[2] The jurisdiction of the court is original and exclusive and not appellate,[3] and is purely statutory.

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[1] L.B. Silver Co. v. Federal Trade Commission, 292 F. 752, (C.A. 6, 1923); Butterick Co. et al v. Federal Trade Commission, 4 F. 2d 910, (C.A. 2, 1925), cert. den. 267 U.S. 602 (1925); Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F. 2d 673 (C.A. 8, 1926).

[2] Curtis Publishing Co. v. Federal Trade Commission, 270 F. 881 (C.A. 3, Pa. 1920), cert. granted 256 U.S. 88 (1921), affirmed 260 U.S. 568 (1923); Butterick Co. et al v. Federal Trade Commission, 4 F. 2d 910 (C.A. 2, 1925).

[3] T.C. Hearst & Son v. Federal Trade Commission, 268 F. 874 (D. Ct. Va. 1920); Butterick Co. et al v. Federal Trade Commission, 4 F. 2d 910 (C.A. 2, 1925); Educators Assn. v. Federal Trade Commission, 108 F. 2d 470 (C.A. 2, 1939).

The Act provides two methods whereby jurisdiction over the final orders of the Commission can be acquired by the circuit courts of appeals, (1) on an application for enforcement filed by the Commission and (2) on a petition to review and set aside the Commission's order filed by a respondent. Each is separate, distinct and independent of the other, seeking entirely different action by and asking entirely different affirmative relief from the courts and the jurisdictional requirements vary.

In the instant matter the jurisdiction of this court was invoked by petitioner under the following applicable provision of the Act: (Clayton Act, §11, 38 Stat. 734, 735; 15 USC 21)

> "Any party required by such order of the Commission * * * to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission * * * be set aside * * *. * * * Upon the filing of the transcript, the court shall have the same jurisdiction to affirm, set aside or modify the order of the Commission * * * as in the case of an application by the Commission * * * for the enforcement of its order * * *."

The applicable provisions of the statute which govern application by the Commission for enforcement of its orders are as follows:

> "If such person (against whom an order to cease and desist has been issued) fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission * * *. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *".

It is clear from the provisions of the statute, therefore, that two separate procedure are provided by which this court's jurisdiction over the order of the Commission can be invoked. In one (which is applicable here) the question of violation is not raised. In the other (not applicable here) the statute specifically raises the question of

violation of the Commission's order and requires the Commission to prove such violation. The statute gives this court exactly the same jurisdiction and power in both instances. It is too well settled to require either argument or citation of authority that under the statute (Clayton Act, 15 U.S.C. 21) this court, on acquiring jurisdiction of the orders of the Commission, is empowered to review, enforce, set aside or modify the Commission's orders.

Relying upon *Federal Trade Commission* v. *Standard Education Society*, 14 F. 2d 947 (C.A. 7, 1926); *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (C.A. 2, 1928), cert. den. 277 U.S. 598; *Federal Trade Commission* v. *Herzog*, 150 F. 2d 450 (C.A. 2, 1945), and leaning heavily upon *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752 (C.A. 6, 1923); *Butterick Co.* v. *Federal Trade Commission*, 4 F. 2d 910 (C.A. 2, 1925), and *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F. 2d 844 (C.A. 7, 1930), petitioner contends that upon affirmance of an order of the Commission a decree of compliance or enforcement will not issue except upon proof of violation or threats of violation. This contention is wholly without merit and petitioner can find no comfort or support in the authorities relied upon.

As we read the petition for rehearing, petitioner's argument is based, and it relies, upon cases arising under the provisions of the statute which we have heretofore indicated is separate and distinct from the statutory provisions governing the instant matter. Petitioner's reliance upon the Standard Education, Balme, and Herzog cases, and its letter addressed to the court dated June 27, 1951, in which it calls the court's attention to this court's decision in *Federal Trade Commission* v. *Standard Brands, Inc.* (a case involving a procedure under a section of the statute not applicable here) is a further indication of the fact that petitioner has an erroneous conception of the applicable provisions of the statute, and the decisions of the court, in reference to petitions to review and set aside the Commission's orders. The court is therefore not here concerned with, and should not give consideration to, the questions raised and the law applicable to a proceeding brought under provisions of the Act, not applicable here.

The question raised and the principles of law announced by this court in the *Standard Education, Balme, Herzog,* and Standard Brands cases relied upon by petitioner are not in point. Each of these cases involved an application by the Commission for enforcement under the provisions of the Act which specifically requires the Commission to prove a violation of its order before an enforcement decree will issue. No such requirement can be found in the provisions of the Act under which this proceeding was instituted and the court should not read such requirement into the Act as it must do if it grants the petition for rehearing.

Petitioner also relies upon the *Silver Company, Butterick*, and *Fairyfoot* cases in support of its position here. These cases are not in point, do not support petitioner's position here, and each can easily be distinguished from the instant matter.

In the *Silver* case the question of a decree of enforcement was raised not by cross-petition or by a prayer in the Commission's brief in the nature of a cross-petition, but upon a motion for recall of the court's mandate modifying and affirming the Commission's order as modified. In refusing to grant the motion, the court, at page 753, said:

> "It does not necessarily follow that the court should take the same action upon a petition by respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for [the purpose of bringing the question of enforcement properly before the court on cross-petition asking for enforcement]."

The court went on to say that the form of the court's order would depend upon whether its jurisdiction was appellate or original and *if original* (it is original and not appellate), the court would *naturally enter its own decree*, fixing the rights of the parties and, in such form the decree would *be enforceable* by the court.

The court further said, at page 754:

> "* * * the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission [here obviously referring to the right of the Commission under the statute to file an application for enforcement and not referring to the petition for review which had already invoked the jurisdiction of the court] it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. * * *"

In the *Butterick* case the court, at page 913, held that if the unlawful practices were being continued there would be an injunction—"* * * but if whatever was unlawful, ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. * * *".

The Court concluded its opinion in the *Butterick* case in the following language:

> "Concluding, as we do, that the Commission's order was properly made, it is affirmed, and the respondent may have an order entered on its cross-petition."

How these cases can be of any comfort to petitioner here is beyond comprehension. The unlawful practices found by the Commission and affirmed by this court have not, insofar as the record before the court is concerned, ceased, but are now continuing, and as the Commission has heretofore stated, implicit in the petition for review petitioner has served notice that it intends to continue the unlawful practices until this court by a decree of enforcement compels it to discontinue such practices.

The *Fairyfoot* case is also distinguishable from the instant matter. There was no cross-petition filed, nor was there any prayer in the Commission's brief by nature of a cross-petition. The question of enforcement was raised by a petition filed by the Commission to show cause why the *Fairyfoot Company* should not be adjudged in contempt for violating the decree of the court affirming the Commission's order. This petition to show cause is similar to an application for enforcement and raises a question of fact, namely, whether the respondent had violated the Commission's order, a question not here raised.

In the *Fairyfoot* case, the court, at page 845, said:

> "Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question."

This is so obvious a reference to procedures other than the type of procedure here involved that comment is unnecessary.

Not only do the cases relied upon by petitioner fail to support its position here, but the greater weight of the authorities are against it. On petitions to review the courts have uniformly enforced the Commission's orders, on the Commission's cross-petitions for enforcement, where no evidence whatever of violation of the orders was shown or even required. This court did so in—

> *L & C Mayers Co., Inc.*, v. *Federal Trade Commission*, 97 F. 2d 365 (C.A. 2 1938). (Petition to review under 15 USC 45, prior to 1938 amendment);

Butterick Company v. *Federal Trade Commission*, 4 F. 2d 910 (C.A. 1925), cert. den. 267 U.S. 602 (1925).

Other circuits which have granted enforcement decrees of valid orders of the Commission under the Clayton Act are as follows: *Signode Steel Strapping Company* v. *Federal Trade Commission*, 132 F. 2d 48, 54 (C.A. 4, 1942); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1, 1940); *Carter Carburetor Corporation* v. *Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8, 1940); *Webb-Crawford* v. *Federal Trade Commission*, 109 F. 2d 268, 270 (C.A. 5, 1940), cert. den. 310 U.S. 638 (1940); *The Great Atlantic & Pacific Tea Company* v. *Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 3, 1938), cert. den. 308 U.S. 625 (1940); *Q. R. S. Music Company* v. *Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7, 1926); *Oliver Brothers* v. *Federal Trade Commission*, 102 F. 2d, 763, 771 (C.A. 4, 1939).

Further than this, on at least three occasions this court has held that conduct violative of a Commission order which the court had simply affirmed without specifically commanding obedience thereto constituted contempt of court, once in *Biddle Purchasing Company* v. *Federal Trade Commission*, No. 15624, (order of June 5, 1941) not reported, and twice in *Leavitt* v. *Federal Trade Commission*, No. 9037 (orders of December 24, 1935, and February 4, 1929), not reported.

In *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683, the Supreme Court indicated that it was not necessary for the Commission to prove a violation of a valid order under a petition to review. The court said, at page 730: "The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order. It is so ordered." Also see *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

The Commission has made no attempt to answer each and every one of petitioner's contentions in its petition for rehearing since it is so obvious that such contentions are based upon facts not in the record and provisions of the statute and decisions of the courts not applicable. Petitioner contends, however, that it would be inconsistent to hold that where the Commission files a petition for enforcement the court will limit itself to the question of affirmance unless violation is proved, but if the respondent files its petition for review an injunction will follow affirmance, as a matter of course. Petitioner argues that such a rule would penalize respondent for applying to this court for a review of the Commission's order. There is no merit to this, and whether it is or is not inconsistent, as argued by petitioner here, is of no concern to this court. If petitioner actually feels that such a procedure would penalize it and places

an undue and unfair burden upon its shoulders, then, in the words of petitioner, such an argument "should be addressed to Congress, and not to this court".

The reason that the provision of the Act applicable here does not require proof of violation before a decree of enforcement is granted by the court is that when a respondent files a petition to review he is denying the validity of the order, asserting his right to continue the practice found to be unlawful, and evincing his intention to violate the order unless the court commands obedience. As this court said in *National Silver Company* v. *Federal Trade Commission*, 88 F. 2d 425, 428 (C.A. 2, 1937):

> "Even if [the prohibited practice had been discontinued], since the petitioner asserts the legal right to use its misleading designation, it is the continuing duty of the Commission to issue, and of the court to affirm and enforce, an order to cease and desist. Here, there is no assurance that there would be a permanent discontinuance. * * * A mere discontinuance of the unfair competition method is no defense, nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue."

Conclusion.

The record of the hearing, and the action of petitioner, before the Commission, establishes this case as one of the most flagrant unlawful price discrimination cases that the Commission has had before it. Further than this, petitioner's contention under its petition to review, and its further contentions under the petition for rehearing, can lead to but one conclusion; namely, that petitioner has no intention of complying with the Commission's order unless and until forced to do so. Petitioner deserves no further consideration from either this court or from the Commission. The Commission can not enforce its orders except through and by virtue of the power and authority of this court. A decree of enforcement carries no penalty or punishment. If petitioner is obeying the Commission's order, a decree of enforcement should be of little concern or interest to it. However, if petitioner is not obeying the Commission's order, or has not discontinued its unlawful practices, a decree of enforcement would have a most salutory effect. Petitioner, as its actions throughout this case indicate, is not overly concerned or worried about an order of the Commission, but petitioner is much concerned with, as the petition for rehearing indicates, and has the deepest respect for, a decree of this court making the Commission's order its own and commanding obedience thereto.

For all of the above reasons, the Commission finally submits that there is no merit to petitioner's position here, and the Commission prays the court to deny the petition for rehearing.

Respectfully submitted,

FEDERAL TRADE COMMISSION

By JNO. W. CARTER, JR.,
Acting Assistant General Counsel.

July 4, 1951.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1950.

(Petition filed June 19, 1951 Decided August 14, 1951.)

Docket No. 21667

THE RUBEROID CO., *Petitioner,*

against

FEDERAL TRADE COMMISSION, *Respondent.*

Before:

L. HAND, AUGUSTUS N. HAND and CLARK, *Circuit Judges.*

On Rehearing[1]

PER CURIAM:

When this appeal was first decided, our mandate was "Order affirmed; enforcement granted." Petitioner now seeks to have us amend our mandate by striking therefrom any reference to enforcement. In the original appeal, petitioner sought, as provided by 15 U. S. C. A. §21, to have us modify an order of the Federal Trade Commission ("FTC") by limiting its scope and by inserting therein certain defenses provided by the Clayton Act as amended. 15 U. S. C. A. §13 *et seq.* The order, based upon violations of the Clayton Act, *supra,* had been entered after a hearing at which petitioner introduced no evidence. Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to

[1] On written submission.

introduce in its defense evidence that the conduct complained of was permitted by exceptions contained in the Clayton Act itself as amended. This, as we understood its position, was substantially all petitioner desired. The FTC, at the close of its brief on appeal, asked that the order be affirmed and that enforcement be granted, citing as authority for the latter request 15 U. S. C. A. §45 (c) which directs such a mandate if a petitioner seeks review of an order based on a violation of the FTC Act, 15 U. S. C. A. §41 *et seq.*, and fails to have such order set aside. Not only is no such provision found in 15 U. S. C. A. §21 which permits a petitioner to seek review of an order of the FTC based on a violation of the Clayton Act as amended, but it is settled that the FTC cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent, *F.T.C.* v. *Herzog*, 2 Cir., 150 F. 2d 450; *F.T.C.* v. *Balme*, 2 Cir., 23 F. 2d 615, cert. den. 277 U. S. 598; *F.T.C.* v. *Standard Brands*, 2 Cir., 189 F. 2d 510. Respondent asks that we treat the closing paragraph of its brief as a cross petition for enforcement of its order. Accepting *arguendo* the propriety of such a manoeuvre, we find unconvincing the FTC's reasons why, upon a cross-petition, it is not required to make the same showing of a threatened violation of its order as it must had it petitioned for enforcement. True, various cases have been cited to us where the courts have granted enforcement of an order when a petitioner has failed in its attempt to have the order set aside but, in no case prior to the one before us, so far as we can determine, has the petitioner objected to such a mandate. As we have indicated, the present petitioner did not deny that its original conduct violated the Act and there was uncontradicted evidence that the practice has been abandoned on which the FTC has not made a finding. Under such circumstances so much of our mandate as directed enforcement of the order was premature and should be stricken.

So ordered.

U.S.C.J.J.

CLARK, *Circuit Judge* (dissenting):

I regret the modification now ordered in our previous opinion at the request, or afterthought, of the petitioner on rehearing; for it tends to fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one. Delay in enforcement was a reason for the reforms of the Federal Trade Commission Act of 1938, of which a chief one was direct and immediate effectiveness of orders where review was not sought and immediate enforcement, on affirmance, of orders brought before the court for review. 15 U. S. C.

§45(c), (g), and (l). Through some mischance this was not carried over in terms to cases under the Sherman Act where the Commission itself sought enforcement, 15 U. S. C. §21; and we have thought the more ancient law there applicable. *F. T. C.* v. *Herzog*, 2 Cir., 150 F. 2d 450; *cf. F. T. C.* v. *Standard Brands*, 2 Cir., 189 F. 2d 510, where there is no discussion of the issue. The *Herzog* case appears not to have won definitive support outside the circuit and possibly the point deserves reexamination in the light of the cases hereinafter cited.[1] But beyond the substantial difference in the statutory wording as to the two forms of proceeding,[2] there is a certain logical difference (whatever the practical realities) between the case where the Commission affirmatively seeks action against a delinquent and where a respondent petitions for review, thus affirming the validity of his own conduct and the invalidity of the Commission action. So the cases have consistently ruled that in the latter case the matter is ripe for full decision, and that two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished.

The cases in support of this proposition are too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate. The principle appears to apply also whether the Commission has cross-petitioned for enforcement, as in the cases cited in Group 1 hereinafter, or whether it has not, as in the cases cited in Group 2. See, *e.g.*, the following

[1] Lack of extra-circuit support may perhaps be connected with the changing trend, from an early heavy burden upon the Commission to show violation of its order, *F. T. C.* v. *Standard Education Society*, 7 Cir., 14 F. 2d 947, down through various cases, even before the amendment of 1938, which in substance placed a burden on the respondent to show that he no longer was doing the questioned acts or asserting the right to do so. See, *e.g.*, *National Silver Co.* v. *F. T. C.*, 2 Cir., 88 F. 2d 425, 428; *F. T. C.* v. *Wallace*, 8 Cir., 75 F. 2d 733; *F. T. C.* v. *Goodyrape Co.*, 6 Cir., 45 F. 2d 70; *F. T. C.* v. *Baltimore Paint & Color Works*, 4 Cir., 41 F. 2d 474; *F. T. C.* v. *Morrissey*, 7 Cir., 47 F. 2d 101, *cf. Butterick Co.* v. *F. T. C.*, 2 Cir., 4 F. 2d 910, 913. Under such a rule what the petitioner can hope to obtain by the present maneuver is little indeed.

[2] Compare 15 U. S. C. §21, 3d paragraph, "*If such person fails or neglects to obey such order*" (italics supplied), the Commission may apply to a court of appeals for enforcement of its order, with the 4th paragraph, beginning, "Any party required by such order of the Commission * * * to cease and desist from a violation charged" may obtain a court review by filing its petition, and continuing that upon the filing of a transcript of the record by the Commission "the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission * * * as in the case of an application by the Commission * * * for the enforcement of its ord[illegible]"

cases in Group 1: *Elizabeth Arden, Inc.* v. *F. T. C.*, 2 Cir., 156 F. 2d 132, certiorari denied 331 U. S. 806; *Southgate Brokerage Co.* v. *F. T. C.*, 4 Cir., 150 F. 2d 607, certiorari denied 326 U. S. 774; *Modern Marketing Service* v. *F. T. C.*, 7 Cir., 149 F. 2d 970; *Signode Steel Strapping Co.* v. *F. T. C.*, 4 Cir., 132 F. 2d 48; *Webb-Crawford Co.* v. *F. T. C.*, 5 Cir., 109 F. 2d 268, certiorari denied 310 U. S. 638; *Oliver Bros.* v. *F. T. C.*, 4 Cir., 102 F. 2d 763. And the following cases in Group 2: *E. B. Muller & Co.* v. *F. T. C.*, 6 Cir., 142 F. 2d 511; *Quality Bakers of America* v. *F. T. C.*, 1 Cir., 114 F. 2d 393; *Carter Carburetor Corp.* v. *F. T. C.*, 8 Cir., 112 F. 2d 722; *Great Atlantic & Pacific Tea Co.* v. *F. T. C.*, 3 Cir., 106 F. 2d 667, certiorari denied 308 U. S. 625. Moreover, the Supreme Court itself has granted enforcement under like circumstances, both on cross-petition, *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 760 (*cf.* below, *A. E. Staley Mfg. Co.* v. *F. T. C.*, 7 Cir., 144 F. 2d 221, 222), or, so far as appears, without such petition. *F. T. C.* v. *Cement Institute* 33 U. S. 683, 730.

In view of this number and weight of authority, petitioner had indeed hardihood to raise the issue; and our decision herein must promote confusion in view of our earlier rulings.[3] At the very least, since the Act is at most ambiguous on our exact point, we have a choice permitting us to follow the cases in the newer and more direct procedure, rather than choosing to tie up commission practice with merely repetitious hearings which can do even the petitioner no good except for the everlasting hope of mischance from a surfeit of judicial proceedings.[4] I would deny the petition.

* * * * * * * * * * *

[3] Although I do not view it as in any way determinative, I do feel that the opinion is seriously in error in the suggestion of uncontradicted evidence "that the petitioner's practice had been abandoned." This is violently controverted by the Commission. As I read the evidence, it was to the effect that while the war did bring about "radical changes" yet at the time of the hearing in 1946 there was still discount to "wholesalers" and "applicators" in New Orleans, claimed to be "because of Competitive conditions"—a point obviously productive of dispute until and unless settled by supportable findings.

[4] One may indeed wonder how much of practical usable law the petitioner has secured. The Commission has referred us to several unreported decisions of ours where we have upheld contempt proceedings without enforcement on top of affirmance, and the wisdom of venturing a violation for lack of Pelion on Ossa might well seem doubtful. A court even moderately jealous of its own dignity might well gag at overlooking planned violation of its own order of affirmance, merely because the latter lacked the two mystic words: "Enforcement granted."

United States Court of Appeals
Second Circuit
Filed Aug 14 1951
Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

THE RUBEROID CO.

v.

FEDERAL TRADE COMMISSION

Order.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of August, one thousand nine hundred and fifty-one.

Present:

HON. AUGUST N. HAND,
HON. CHARLES E. CLARK,
HON. LEARNED HAND,

Circuit Judges.

THE RUBEROID CO., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, *Respondent.*

A petition for a rehearing having been filed herein by counsel for the Petitioner,

Upon consideration thereof, it is

Ordered that so much of the decision as directed enforcement of the order was premature and should be stricken.

ALEXANDER M. BELL,
Clerk

United States Court of Appeals
Second Circuit
Filed Sep 4 1951
Alexander M. Bell, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE RUBEROID CO., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Docket No. 21667

Final Decree.

The Ruberoid Co., petitioner herein, having filed in this Court on April 25, 1950, its petition to review and set aside an order to cease and desist issued January 20, 1950, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of The Ruberoid Co., a corporation, Docket No. 5017"; and said petition having been served upon respondent; and respondent having thereafter certified and filed herein as required by Section 11 of the Clayton Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument; and this Court having rendered its decision on June 4, 1950, affirming and granting enforcement of the said order of the Commission; and petitioner thereafter having duly petitioned this Court for rehearing as to whether the decree to be entered herein should enjoin petitioner from violating the provisions of said order of the Commission or should be limited to affirmance thereof, and the Court having fully considered the matter upon said petitions for review and for rehearing, it is hereby

ORDERED, that the said petition for rehearing be, and the same hereby is, granted; and that the opinion and decision of this Court filed herein on June 4, 1951, be revised by striking out the words "for appropriate enforcement" in the last sentence of the opinion, and by striking the words "enforcement granted" from the decision so that the same shall read "Order affirmed"; and it is further

ORDERED, ADJUDGED AND DECREED, that the order to cease and desist issued by the Federal Trade Commission against petitioner on January 20, 1950, in a proceeding before said Commission entitled "In the Matter of The Ruberoid Co., a corporation, Docket No. 5017", be, and the same hereby is, affirmed.

Dated, August 30, 1951.

AUGUSTUS N. HAND
L. HAND
United States Circuit Judges.

Filed: September 5, 1941

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing papers, numbered from I-VII & 1- to 198, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case of

THE RUBEROID CO., *Petitioner,*

against

FEDERAL TRADE COMMISSION, *Respondent.*

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this day of in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the said United States the one hundred and seventy-sixth.

SEAL

ALEXANDER M. BELL, *Clerk.*

United States Court of Appeals
Second Circuit
Filed Nov 1 1951
Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

RUBEROID COMPANY

v.

FEDERAL TRADE COMMISSION

Order.

At a Stated Term of the United States Court of Appeals, in and for the Second District, held at the United States Court House, in the City of New York, on the 1st day of November, one thousand nine hundred and fifty-one.

Present: HON. AUGUSTUS N. HAND, *Circuit Judge.*

RUBEROID COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

An application having been made herein by counsel for the respondent to authorize the Clerk of this Court to transmit the original transcript of record in this case to the Supreme Court of the United States for use in connection with the petition for a writ of certiorari,

Upon consideration thereof, it is

Ordered that the said application be and it hereby is granted.

Further ordered that the Solicitor General do whatever is necessary to effect the return of said record to this Court on completion of the case in the Supreme Court of the United States.

AUGUSTUS N. HAND
U.S.C.J.

July 10, 1951.

The Honorable Learned Hand, Augustus N. Hand and Charles E. Clark, Circuit Judges.
United States Court of Appeals for the Second Circuit,
Federal Courts Building,
New York 7, New York.

Re: The Ruberoid Co. v. Federal Trade Commission, No. 149, October Term, 1950—On Petition for Rehearing

Dear Sirs:

The Answer filed herein by the Commission abounds with reckless and extravagant statements which we cannot allow to pass unchallenged. Some of these statements are directly contrary to the facts of record. We deem if our duty to call this to the Court's attention, and hope that a brief reply in this form will be accepted.

The Commission takes the unwarranted position that "implicit in the petition for review the petitioner has served notice that it intends to continue the unlawful practices", and that "when a respondent files a petition to review he is * * * evincing his intention to violate the order unless the court commands obedience". If that were true, then every defendant who contests an injunction suit would be presumed to be continuing or threatening the unlawful practice charged, regardless of factual evidence of prior discontinuance. The presumption, if any, should be that petitioner discontinued the practices found unlawful after they were called to its attention and that it has thenceforth complied with the Act and with this order. Here, however, petitioner does not have to rely on presumptions.

The record affirmatively shows that the price discriminations found by the Commission had been wholly discontinued prior to the hearings in this case in 1946, more than four years before the issuance of the order. The Commission's assertions to the contrary are at variance with the undisputed evidence, and calculated to mislead the Court as to the facts.

Mr. O'Leary was questioned at length by the Commission's attorney as to petitioner's pricing policies in 1946, both in New Orleans and elsewhere (fols. 97-105). It will be recalled that the discriminations in 1941 resulted from the allowance of wholesaler discounts to four dealers in New Orleans who functioned as retailers or applicators, which discounts were not granted other retailers and applicators. Mr. O'Leary testified that these discriminations had been eliminated by restricting sales in New Orleans to five customers and by the adoption of a one price policy, selling to all at the same discounts regardless of whether they functioned as

wholesalers, retailers or applicators and regardless of quantities purchased. It appears further that petitioner's pricing policies in New Orleans both in 1941 and 1946 were formulated to meet local competitive conditions and were not indicative of its pricing elsewhere. Mr. O'Leary testified that in other territories petitioner observed the functional distinction between wholesalers and retailers and allowed the wholesale discount only to recognized wholesalers. This testimony directly contradicts the statements regarding the record made on page 3 of the Commission's answer. The fact is that the unlawful discriminations found were discontinued prior to 1946, did not exist outside of New Orleans, and have never been resumed. The assertion that this case was "one of the most flagrant" price discrimination cases the Commission ever had, is, of course, absurd.

This order in terms prohibits any price differential between competing purchasers, whether the differential is lawful or unlawful. The Court has refused to modify the order, but has assured petitioner that in the event of a subsequent enforcement proceeding it will not be construed as prohibiting differentials which the statute expressly permits. It is not clear that the Commission accepts this construction. The Commission now states that "the evidence in the record establishes * * * that petitioner at the time of the hearing was selling its products of like grade and quality to some customers at a lower price than to other customers". The indication is that the Commission's attorneys still regard any differential as unlawful. Petitioner believes that there is a real danger that if the court now grants enforcement it may be subjected to the publicity of a contempt proceeding on account of using price differentials falling within the provisos of the Act.

The Commission asserts that the statutory provisions as to enforcement have no application here, and relies solely upon the provisions permitting petition for review (which do not mention enforcement). Its position is that if the respondent petitions for review and the order is affirmed, the Commission should have an injunction upon request, even though it would not be entitled to such relief upon its own petition.

Where a petition for review is filed by the respondent named in the order, the question of prior violation of the order does not arise unless the Commission files a cross-petition or otherwise applies for enforcement. If the Commission does ask enforcement, then both the issue of affirmance and the issue of enforcement are presented and the court's jurisdiction is exactly the same as if the Commission had originally applied for enforcement. Where the question has been presented the courts have consistently refused to grant enforcement if it appears that the forbidden practices were abandoned upon or prior to the issuance of the order and there is no

threat of renewal. The Commission has cited no case to the contrary.

In the *Cement Institute* case, cited by the Commission, the cement companies openly and admittedly continued their multiple basing point system until the case reached the Supreme Court. That case stands upon the same footing as the *Bu[illegible]rick* case in this court.

In *Electro-Thermo Co.* v. *F. T. C.* (91 F. 2d 477), the opinion shows that the court, while asserting its plenary jurisdiction, granted only affirmance and not enforcement.

In *National Silver Co.* v. *F. T. C.* (88 F. 2d 425) this Court granted enforcement because the petitioner came before it asserting the legal right to continue the false advertising prohibited by the order. Here petitioner conceded the illegality of the price differentials which the Commission found, and discontinued them long before the order was issued.

There are, of course, a number of cases where the Commission has applied for and obtained court enforcement without opposition.

At the end of its brief the Commission asked for an enforcement order upon authority of an inapplicable provision of the Federal Trade Commission Act as amended. It now attempts to justify this upon the ground that it apparently succeeded in misleading the Third Circuit into granting enforcement in reliance upon the same inapplicable provision in *Great Atlantic & Pacific Tea Co.* v. *F. T. C.*, 106 F. 2d 67.

We do not question the jurisdiction of the court; and it is immaterial whether the request in the Commission's brief be considered sufficient as a cross-petition. We do submit that the Commission is entitled to no greater or different relief upon a petition for review and cross-petition for enforcement than if the proceeding had originated upon an application for enforcement. To hold otherwise would do violence to the language of the Act. The questions of affirmance and enforcement are equally presented, and the court's jurisdiction is the same, in either case.

Respectfully yours,

AUSTIN & MALKAN,
Attorneys for Petitioner.
By CYRUS AUSTIN.

CA:gks

Clerk's Certificate to the foregoing transcript omitted in printing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1939 041650 503

189 Supreme Court of the United States

No. —, October Term, 1951.

[Title omitted.]

Order extending time to file petition for writ of certiorari

November 23, 1951

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 28, 1951.

(S) ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

191 Supreme Court of the United States

No. 448, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed January 28, 1952

The petition herein for a write of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transscript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

192 Supreme Court of the United States

No. 504, October Term, 1951

[Title omitted.]

Order allowing certiorari

Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transscript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

193 In the Supreme Court of the United States

October Term, 1951

[Title omitted.]

Stipulation

Filed February 6, 1952.

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of hearing and determining the cases on the merits, the printed record shall consist of the printed record on the petitions for writs of certiorari.

It is further stipulated and agreed that either of the parties may refer in briefs and argument to the original transcript of record on file in this Court, including any part thereof which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner in No. 448.

CYRUS AUSTIN,
Counsel for Petitioner in No. 504.

U. S. GOVERNMENT PRINTING OFFICE: 1952